

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, ET AL.,)	CASE NO: 2:13-CV-00193
)	
Plaintiffs,)	CIVIL
)	
vs.)	Corpus Christi, Texas
)	
RICK PERRY, ET AL.,)	Tuesday, February 28, 2017
)	(8:59 a.m. to 11:12 a.m.)
Defendants.)	(11:34 a.m. to 12:04 p.m.)

AMENDED TRANSCRIPT

ORAL ARGUMENTS

BEFORE THE HONORABLE NELVA GONZALES RAMOS,
UNITED STATES DISTRICT JUDGE

Appearances:	See Next Page
Court Recorder:	Genay Rogan
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1 Corpus Christi, Texas; Tuesday, February 28, 2017; 8:59 a.m.

2 (Courtroom and telephonic appearances)

3 (Call to Order)

4 **THE COURT:** Court calls Cause Number 2:13-cv-193,
5 *Veasey, et al. versus Abbott, et al.* If the plaintiffs will
6 announce for the record.

7 **MR. ROSENBERG:** Ezra Rosenberg from the Lawyers'
8 Committee of Civil Rights Under Law on behalf of the Texas
9 State Conference of NAACP Branches and the Mexican American
10 Legislative Caucus of the Texas House of Representatives.

11 **THE COURT:** Okay.

12 **MR. DUNN:** Good morning. Chad Dunn in the courtroom
13 on behalf of the Veasey plaintiffs and some of my co-counsel
14 will be listening by phone.

15 **THE COURT:** All right.

16 **MS. NELSON:** Good morning, your Honor. Janai Nelson
17 of the NAACP Legal Defense and Educational Fund, with my
18 colleague, Deuel Ross, and our co-counsel Wilmer-Hale,
19 represented by Tania Faransso.

20 **THE COURT:** Okay.

21 **MS. PEREZ:** Your Honor, Myrna Perez. I represent the
22 Texas NAACP and the Mexican American Legislative Caucus. I'm
23 here with Jen Clark and I have a number of colleagues on the
24 phone.

25 **THE COURT:** All right.

1 **MR. GARZA:** Jose Garza with the Taylor plaintiffs,
2 together with Marinda Van Dalen.

3 **THE COURT:** All right. Any other one here for the
4 plaintiffs? Yes, sir?

5 **MR. GORE:** John Gore on behalf of the United States.

6 **THE COURT:** Yes. I did receive the Motion for
7 Admission Pro Hac Vice and I signed that yesterday.

8 **MR. GORE:** Thank you, your Honor.

9 **MS. COLMENERO:** Your Honor, Angela Colmenero on
10 behalf of the State defendants and I'm here with Matthew
11 Frederick and Jason LaFond.

12 **THE COURT:** Okay. Anyone else?

13 **(No audible response)**

14 All right. And who's appearing by phone?

15 **MR. HEBERT:** Your Honor, this is Jerry Hebert and
16 Danielle Lang on behalf of the Veasey LULAC plaintiffs.

17 **THE COURT:** All right.

18 **MR. SPEAKER:** (indiscernible).

19 **MR. BARON:** Your Honor, Neil Baron also appearing by
20 phone on behalf of the Veasey LULAC plaintiffs.

21 **MR. DERFNER:** Armand Derfner on the phone for the
22 Veasey LULAC plaintiffs.

23 **MS. WEISER:** Wendy Weiser by phone for the Texas
24 NAACP and MALC plaintiff.

25 **THE COURT:** Anyone else appearing by phone?

1 **(No audible response)**

2 All right. I know yesterday, Mr. Gore, the
3 Government -- the United States filed a motion for voluntary
4 dismissal of the discriminatory purpose claim without
5 prejudice, and I saw where Texas consented to that motion, and
6 I guess the plaintiffs had no position on the motion, and they
7 didn't agree with the reasoning, but stated they might be
8 filing a response. So, I'm not sure where we are on that.

9 **MR. ROSENBERG:** Your Honor, Ezra Rosenberg. Yes, we
10 received a motion at the time many of us were flying to Corpus
11 Christi, and, therefore, we were unable to reach a firm
12 position on the ultimate relief on the motion and are not --
13 were not taking a position at the time. Mr. Dunn is going to
14 be addressing some of the issues raised by the motion. The
15 private plaintiffs would request an opportunity to brief a
16 response to the motion, because they vehemently oppose the
17 reasoning behind the motion on, really, every ground that's set
18 forth in it, but we've not had a chance, given the logistics,
19 to sit down and talk about whether we would agree to the motion
20 under certain conditions or -- or some other position.

21 **THE COURT:** Okay. Mr. Gore, any comments on that?

22 **MR. GORE:** I think the motion speaks for itself, your
23 Honor.

24 **THE COURT:** Okay. So, it sounds, though, at this
25 point, it was just filed yesterday, plaintiffs are wanting to

1 file a response, so --

2 **MR. GORE:** That's correct, your Honor, and -- and
3 we're happy to allow the plaintiffs to do that --

4 **THE COURT:** Okay.

5 **MR. GORE:** -- in the appropriate time within the
6 rules.

7 **THE COURT:** All right. So, then, speaking to that,
8 though, there is the issue of there is a new voter ID bill that
9 has been filed, so if it's enacted into law, how does that
10 affect our proceeding?

11 **MR. GORE:** Well, we think that the mere consideration
12 of that law at this point, your Honor, requires the Court to
13 forbear and to wait until the end of the legislative session
14 before taking any further action. We think that's the clear
15 directive of the Fifth Circuit in this case --

16 **THE COURT:** But what does it do to this case, though?
17 What does it do to the Veasey case?

18 **MR. GORE:** If it's enacted? Or if it's -- you know,
19 if it's --

20 **THE COURT:** If it's enacted.

21 **MR. GORE:** If it's enacted, I think you could have
22 all kinds of ramifications for the Veasey case. We don't know
23 yet exactly what the Texas legislature might enact, but the
24 Fifth Circuit made a couple of things clear. It made clear,
25 first, that any new law would bear on the merits of a purpose

1 claim. It would also, obviously, bear on the remedy and all
2 the other issues that remain in the case. The Fifth Circuit
3 said that the record on remand must be supplemented by any
4 intervening legislative action, and it also specifically
5 directed the Court to bear in mind the effect of any interim
6 legislation when it reexams the purpose claim. And, so, the
7 reason for that I think is very clear; because a new law might
8 fix some of the issues that the Fifth Circuit identified and
9 relied upon in ordering a remand in this case.

10 For example, a new law might eliminate the
11 discriminatory effect that the Fifth Circuit identified in its
12 opinion; it might insert ameliorative provisions into Texas's
13 voter ID law; it might be enacted without procedural
14 irregularities or departures. So, if the Court forges ahead on
15 the purpose claim or any other issue at this time, including
16 remedy or -- or any other issue in the case, on the current
17 record, it might have to do its work all over again. It might
18 have to consider all of those issues again on a new record, on
19 new briefing, and on new argument. And that's why we jointly
20 moved with Texas last week to postpone today's hearing, so that
21 the Court would have the benefit of any intervening legislative
22 action and could move efficiently to resolving the case only
23 once and not, potentially, twice. And, moreover, the law in
24 the Fifth Circuit and the Supreme Court for decades has been
25 that where a federal court finds a voting rights violation it

1 must refer the remedy to the legislature in the first instance
2 so that the legislature has the first opportunity to consider
3 the appropriate remedy.

4 **THE COURT:** So, it only goes to remedies?

5 **MR. GORE:** I -- no, I don't believe that it does in
6 this case, your Honor, first of all, for the reason I just laid
7 out, which is the Fifth Circuit specifically said that it would
8 go to the merits of the purpose claim in this case. Second of
9 all, here in this case, Texas wants to get an early start on
10 addressing this legislatively. That's all the more reason the
11 Court ought to defer, so that the Court doesn't have to do
12 unnecessary work.

13 **THE COURT:** But how does it go to the intent, the
14 discriminatory purpose, if we're looking at what happened when
15 SB 14 was passed?

16 **MR. GORE:** A couple of responses on that, your Honor.
17 First of all, a major component of the intent argument so far
18 has been that SB 14 or the current voter ID statute has a
19 discriminatory effect. The Texas legislature may enact a
20 reasonable impediment exception or some other exception to the
21 law that removes that discriminatory effect entirely. So, that
22 takes out that particular basis for the ruling. It also might
23 enact ameliorative provisions to the law, like I've just
24 mentioned, that would lessen its impact. So, regardless of
25 whether there -- what the record was at that time, the record

1 is currently evolving in light of this intervening legislative
2 action. And if Texas follows through, as we are hopeful that
3 it will, and enacts an appropriate legislative amendment to its
4 voter ID law, that could resolve the entire case, potentially,
5 under the Fifth Circuit's own reasoning.

6 **THE COURT:** All right.

7 **MR. GORE:** So, we -- we encourage the Court to follow
8 that course and to allow the Texas legislative process to play
9 out before addressing anything in this case.

10 **THE COURT:** It does not moot the Veasey case, is what
11 you're saying. If there's a new -- if this bill -- voter ID
12 bill is enacted into law, I still have to proceed and make
13 findings as requested by the Fifth Circuit, right?

14 **MR. GORE:** I don't necessarily believe that the Court
15 would have to. I think at that point we would have a new
16 record on which to address that, and the United States is no
17 longer pursuing a purpose claim.

18 **THE COURT:** So, all of a sudden the new law now
19 becomes the case I'm dealing with?

20 **MR. GORE:** I -- I think it's highly relevant to the
21 analysis in this -- in this case, your Honor, under the Fifth
22 Circuit's own directions. And it would be -- and it would
23 certainly be relevant to the question of remedy on the
24 discriminatory effect claim.

25 **THE COURT:** Right. And I'm kind of separating

1 remedies, because we're not even there yet as to what it might
2 do with remedies.

3 **MR. GORE:** Okay.

4 **THE COURT:** I'm just talking about what effect does
5 it have on the Veasey case in terms of what we're here doing
6 today, the discriminatory purpose claim.

7 **MR. GORE:** Sure. And I think that it's impossible to
8 say one way or the other, because we don't know yet what the
9 legislation is going to be. The legislation has been
10 introduced, it has super majority support in the senate, it has
11 the support of the Texas Attorney General, but we don't know
12 yet whether it's going to be amended, whether there are going
13 to be other provisions added to it or taken from it, before
14 it's ultimately enacted into law.

15 **THE COURT:** Which would affect the remedies,
16 potentially, right? How does it affect the Court's ruling on
17 discriminatory purpose?

18 **MR. GORE:** As -- as the Fifth Circuit --

19 **THE COURT:** On SB 14.

20 **MR. GORE:** No, I understand that. As the Fifth
21 Circuit -- the Fifth Circuit explained that it affects the
22 intent question because it might address some of the
23 deficiencies in the law. Once a new law is enacted to amend
24 SB 14, you have to look at the total picture of the complete
25 law, both SB 14 and any intervening legislative remedies. So,

1 it's almost like you have to look -- the Court has to look at
2 the entire package of legislation there in light of the
3 intervening changes that have been made. And if Texas steps up
4 to the plate and says, "We're addressing the issues that have
5 been identified by the Fifth Circuit," and follows through and
6 does that, we have a new legislative mosaic that paints a new
7 picture of the legislature's overarching intent with respect to
8 voter ID. And that's what I think the Fifth Circuit was getting
9 at when it said that the Court should bear in mind the effect
10 of any intervening legislative remedy or legislative action on
11 the intent question. So, we think that this is -- given this
12 posture, it's premature.

13 Now, let me just point out that we're in a very
14 unique position to be able to do this. This doesn't always
15 happen in these voting rights cases, because there is no
16 urgency and no harm to Texas voters from forbearing for just a
17 couple of months during the legislative session. The
18 legislative session will end at the end of May; the Governor's
19 signature would have to be appended to any new law by June
20 18th; and, of course, the Court's interim remedy continues to
21 govern any elections and to protect any Texas voters who
22 participate in those elections between now and then.

23 **THE COURT:** Which sounds like that interim remedy may
24 have caused a lot of problems, right?

25 **MR. GORE:** Well, I think that any time there are --

1 there are changes to an election system close to an election,
2 there can be some confusion as the state election authorities
3 work that out. But now we don't have -- the 2016 election was
4 a -- was a large federal and statewide general election. We
5 have no election of that scope or scale coming up in Texas,
6 number one; number two, the State now has the benefit of the
7 experience of the 2016 general election, and I would imagine
8 can much more smoothly implement this Court's interim remedy
9 for any remaining -- any elections that are coming up. My
10 understanding is that there are a few municipal elections in
11 the next couple of months, but, obviously, no statewide
12 elections and no federal elections. So, both the scope of what
13 the State has to do has been dramatically changed, and it has
14 the benefit of its experience of going through the 2016 general
15 elections.

16 So, the interim remedy tracked also what the Fifth
17 Circuit said. The Fifth Circuit suggested, without
18 distinguishing between the purpose and effect claims, that a
19 reasonable impediment exception would be an appropriate remedy
20 here, or potentially an appropriate remedy, and the SB 5 that
21 has been introduced into the Texas senate, with super majority
22 support, largely tracks that remedy and puts it in place. The
23 Fifth Circuit's case law, its directions in this case are
24 clear, its directions in prior cases are clear, the decisions
25 of the Supreme Court are clear, that deference is owed to allow

1 a state legislature or governing body the first opportunity to
2 address the issues raised in the Fifth Circuit's opinion.
3 We're at a unique juncture, as well, because the Texas
4 legislature actually is in session. It's in its regular
5 biennial session. All of this is different from what happened
6 back in the fall. When the Fifth Circuit issued its opinion on
7 July 20th, it determined that it was not feasible to refer the
8 matter to the Texas legislature in the first instance. The
9 2016 statewide and federal general elections were impending,
10 the Texas legislature wasn't in session, and Texas had not
11 asked the courts to defer to its legislative prerogatives. All
12 three of those circumstances have now changed dramatically.
13 They have all completely flipped; because there are no
14 impending statewide or federal elections, Texas legislature is
15 in session, does have a unique opportunity to address this, and
16 it has, in fact, introduced a bill that's got a lot of
17 political support, and it's asked the Court to forbear for just
18 a couple of months so that it can complete its legislative
19 task. Once that task is completed, we'll then have a full
20 picture for all of the parties and the Court to determine the
21 questions that remain in this case, if any.

22 So, all of the benefit would be to forbear. It would
23 serve the interests of judicial economy to avoid having to
24 decide this case twice; it can be decided once, it can be
25 decided in a couple of months, because Texas's voters are being

1 protected by the interim remedy. That's why we asked the Court
2 to follow this course last week when we filed the joint motion
3 to postpone this hearing. In light of the Court's decision to
4 proceed, we filed our motion yesterday, because we think that
5 that course gives full effect to the Fifth Circuit's opinion
6 and allows Texas the first opportunity that is requested and
7 that the governing case law from the Fifth Circuit and Supreme
8 Court accord it to address the issues raised in the Fifth
9 Circuit's opinion legislatively.

10 **THE COURT:** Okay. Ms. Colmenero, do you want to add
11 anything to that?

12 **MR. GORE:** Thank you, your Honor.

13 **MS. COLMENERO:** Thank you.

14 Just a couple of points, your Honor. We agree with
15 the reasons expressed by the United States as to why this Court
16 should defer ruling on the issue of discriminatory intent. We
17 also want to alert the Court that as of yesterday there was a
18 companion piece of legislation filed in the Texas house, that
19 is, HB 2481, which is an identical bill to SB 5, which was
20 filed last week in the Texas senate. That Texas house bill has
21 five joint authors, which is the maximum number of joint
22 authors that you can have for legislation in the house, and
23 with a low bill number in the senate, over 20 joint authors for
24 the senate bill, five joint authors in the house bill, this
25 reflects a broad array of house leadership and senate

1 leadership support, and we anticipate that the legislature will
2 adopt new legislation this session that is similar to the
3 Court's interim remedy order that is -- that is being
4 considered now before the Court.

5 So, we also agree that there is no harm to Texas
6 voters if there is a delay for several months before this Court
7 considers the discriminatory intent issue again in light of the
8 interim remedy order that remains in place.

9 **THE COURT:** All right. Thank you.

10 Mr. Dunn, I believe you're speaking for the
11 plaintiffs on that issue?

12 **MR. DUNN:** Yes. Thank you, your Honor.

13 Last fall, of course, the parties came to the Court
14 upon remand to schedule argument, this argument today, in this
15 case. And at that point the private plaintiffs and the United
16 States each filed briefs suggesting that the decision on intent
17 needed to come before the decision on remedy. In fact, the
18 State made the same argument that's been advanced here, which
19 is that the legislature would soon be meeting. And, indeed,
20 that was considered by the en banc court when it referenced
21 when the legislature meets and the necessity of the legislature
22 giving a review to the en banc decision and addressing a
23 potential remedy. But what the Fifth Circuit did not say is
24 that this Court should delay its actions or that this Court
25 should wait for the actions of the legislature, when and if

1 they ever come.

2 So, we believe that the United States and its
3 original briefing in the fall and the private plaintiffs'
4 briefing stands for the same reasoning today and ought to be
5 affirmed by the Court, which is, in order to address the remedy
6 in this case, we must first identify and describe the depth of
7 the violation. Now, we hear from the United States today that
8 perhaps Senate Bill 5 or some other measure the legislature
9 considers and passes may, as I heard, deal with some of the
10 discriminatory effect of Senate Bill 14. But that's precisely
11 the purpose of 3(c) of the Voting Rights Act, is to create a
12 condition where an Article III Court doesn't just deal around
13 the edges with some of the harm of a purposefully
14 discriminatory act, but, instead, strikes it down in all of its
15 tentacles and all of its application. The U.S. Supreme Court
16 has said that a bill or a law passed by a state with a
17 discriminatory intent is due no deference whatsoever. And
18 although the court remedy entered in this case was a giant leap
19 forward for my clients and so many voters in the state, it,
20 nevertheless, retains the discriminatory architecture of Senate
21 Bill 14. And although Senate Bill 5, when and if it passes,
22 under what provisions it ends up containing, may ultimately
23 change the staging of address of Senate Bill 14, the underlying
24 architecture, nevertheless, remains. And, as the Court knows,
25 the plaintiffs have argued consistently throughout this case

1 that Senate Bill 14 was crafted with a picking and choosing of
2 approved ID's; ID's that were disproportionately chosen in
3 favor of Anglo citizens and against the interests of African-
4 American, Latinos, elderly, and other citizens. That basic
5 architecture remains in place. People who are subjected to the
6 reasonable impediment process, the additional questioning by
7 election officials, and the stigma that's involved in
8 participating in the process are, nevertheless, today singled
9 out for that undertaking because of what the legislature chose
10 to do in 2011 and the reasons it chose to do it.

11 Now, this Court's work in an intent case is -- is,
12 unlike so many other cases, surprisingly less difficult than
13 normal. The en banc court, the Fifth Circuit, no one knows
14 better than I the Fifth Circuit's skepticism in some cases of
15 voting rights cases, but, nevertheless, they easily came to the
16 conclusion that there was substantial evidence of intent in
17 this case.

18 The Court should undertake, as it decided to do in
19 the fall, at the urging of the United States and the private
20 plaintiffs, the analysis today as to whether or not there was a
21 discriminatory intent, and that analysis can be produced to the
22 Court when its facilities allow, and ultimately, when and if
23 the legislature adopts some type of remedy, that remedy can be
24 weighed against the complete weight of the violation that has
25 been proven by the evidence in this case.

1 The last point I would like to make, or, actually,
2 the final two points I would like to make, is that there is
3 this notion that there is no coming federal election. And
4 although that's an unassailable point on its own, there are a
5 number of elections that proceed. And under state law there
6 are four uniform election dates for which jurisdictions can
7 schedule elections. There's no doubt in my mind this upcoming
8 May that there are school districts and local municipal utility
9 districts undertaking elections; there will be additional
10 elections come November. And although it may be that fewer
11 people are subjected to the architecture of Senate Bill 14 in
12 those elections, it's, nevertheless, true that people will
13 still be subjected to Senate Bill 14 in the weeks and months
14 ahead. Also, we've learned throughout the litigation, from
15 2011 to present, that time is always of the essence, because
16 there always seems to be another appeal or another argument,
17 another step in the advancement of the process in order to get
18 to the final goal of justice.

19 So, although it has been necessary and, no doubt,
20 helpful to the Court that the parties have briefed this
21 thoroughly up until now, it is, nevertheless, time to make a
22 decision on discriminatory intent, if for no other reason than
23 to state what happened in 2011 with Senate Bill 14, and address
24 whether and how, under the Voting Rights Act, Section 3(c), the
25 State of Texas should be supervised in its changes to election

1 laws moving forward. We think the motion, then, ought to be
2 denied, insofar it asks for delay of this action, and proceed
3 to argument and decision on this issue.

4 **THE COURT:** All right. Anything else from any other
5 plaintiffs?

6 **MR. ROSENBERG:** Well, the only additional point I
7 will make, and then I -- I guess it might be my turn to just
8 stand up here and argue, is that whatever happens with SB 5 has
9 no bearing on what the intent was behind SB 14 in 2011.

10 And if your Honor wishes, I can proceed with my
11 argument on the merits.

12 **THE COURT:** Yeah, anything further on the issue of
13 SB 5?

14 **MR. GORE:** Yeah.

15 **THE COURT:** Yes.

16 **MR. GORE:** A brief response on a couple of points,
17 your Honor. First of all, the Fifth Circuit said exactly the
18 opposite with respect to the effect of interim legislative
19 relief. I'll just read from the opinion on page 271. It says:

20 "Any new law would present a new circumstance not
21 addressed here. Such a new law may cure the
22 deficiencies addressed in this opinion. Neither our
23 ruling here, nor any ruling of the district court,
24 should prevent the legislature from acting to
25 ameliorate the issues raised in this opinion, thus

1 limit those issues to discriminatory effect or any
2 other theory."

3 Then it says, in the final paragraph -- this is on
4 page 272:

5 "The district court will need to reexamine the
6 discriminatory purpose claim in accordance with the
7 proper legal standards we have described bearing in
8 mind the effect any interim legislative action taken
9 with respect to SB 14 may have."

10 The Fifth Circuit should not have been clearer that
11 any interim legislative action bears on the discriminatory
12 purpose claim. And the reason is that it paints a complete
13 legislative mosaic of the legislature's intent with respect to
14 the voter ID issue and SB 14 and SB 5 or whatever law is
15 enacted as a complete package. Moreover, the Fifth Circuit did
16 say that in the appropriate case, where there is not an
17 impending statewide or federal election, the court should defer
18 to the legislature to give it the first opportunity. That's on
19 page 270 of the opinion, and it even went so far as to say:

20 "When feasible, our practice" -- the Fifth Circuit --
21 "has been to offer governing bodies the first pass at
22 devising remedies for Voting Rights Act violations."

23 It then goes on to say that a reasonable impediment
24 exception would be potentially an appropriate amendment here.
25 And, finally, there was a suggestion that Texas voters today

1 are being subjected to the architecture of SB 14. I think
2 counsel used that phrase a couple of times. That is
3 inaccurate, because the Court has entered an interim legis- --
4 interim judicial remedy that's governed the elections. It
5 governed the 2016 general election; it was agreed to by all of
6 the parties; there is no evidence to suggest that it had any
7 discriminatory effect in its application; and it is precisely
8 the kind of remedy that the Fifth Circuit invited the Court to
9 enter. The Court entered it, elections have been conducted
10 under it, and elections will continue to be conducted under it
11 until a new remedy is entered. So, there is no harm to Texas
12 voters at this -- at this time, because the interim remedy
13 protects them.

14 The Texas legislature has asked for an opportunity
15 over the next couple of months to make permanent and by
16 legislation some kind of reasonable impediment exception. The
17 house has now picked up this effort, as well. We are hopeful
18 that Texas will follow through on that. We think that is the
19 quickest way to resolve this case. It is the best approach for
20 the Court to avoid deciding issues unnecessarily and on an
21 evolving record.

22 Thank you.

23 **THE COURT:** Okay. And does the bill as filed -- and
24 either you, Ms. Colmenero -- address any additional ID's that
25 would be allowed?

1 **MS. COLMENERO:** No, your Honor. The bill
2 virtually -- it's virtually identical to the Court's interim
3 remedy order and prescribes the use of an indigency affidavit
4 or reasonable impediment affidavit like the kind the Court
5 ordered in its interim remedy order back in August. And --
6 and, so that -- that is really what the purpose is of SB 5, as
7 well as the house companion bill.

8 **THE COURT:** All right. Thank you.

9 So, shall we then move to argument on --

10 **MR. ROSENBERG:** Thank you, your Honor. If I -- can I
11 address -- make one response to something Mr. Gore just said?

12 **THE COURT:** Okay.

13 **MR. ROSENBERG:** That any reference to deficiencies
14 that could be cured by legislation in the Fifth Circuit opinion
15 were necessarily limited to deficient -- the only deficiencies
16 that it found, which were the Section 2 results deficiencies,
17 because it had not yet ruled that there were, in fact, so-
18 called "intent" deficiencies, and that's the purpose of today's
19 hearing. Virtually all of that discussion has to do with
20 remedies or the Section 2 effects, has nothing to do with the
21 purpose.

22 May it please the Court, your Honor. The private
23 plaintiffs have tried to divide the argument among themselves
24 in order to eliminate redundancies. I'm going to be addressing
25 primarily the meaning and effect of the Fifth Circuit opinions,

1 the inferences that the Court can draw from what is now the
2 irrefutable overarching facts, the inferences that this Court
3 should not draw because Texas is precluded from making
4 arguments and because the record does not support them; and
5 Ms. Nelson is going to dive a little more deeply into some of
6 the more important facts that support our intentional
7 discrimination claim; Mr. Garza and Mr. Dunn will offer short
8 statements on behalf of their clients; and Ms. Perez will
9 present the rebuttal for the private plaintiffs.

10 My primary theme, your Honor, is fairly simple. And
11 that is that your Honor got it right the first time around and
12 that there is nothing in the Fifth Circuit's opinion that
13 suggests that your Honor cannot reach or should not reach the
14 same conclusion upon remand. In fact, the Fifth Circuit's
15 opinion was largely an affirmation of your Honor's approach and
16 reasoning in support of her initial conclusion. The Fifth
17 Circuit specifically confirmed the legal standards that your
18 Honor used, confirmed the approach that your Honor used in
19 terms of the categories of evidence that your Honor felt fit to
20 review subject to the *Arlington Heights* standard. Though it
21 found that there may have been some inordinate reliance on a
22 handful of subsidiary facts, there was not a single finding of
23 fact by this Court that the Fifth Circuit questioned as
24 unsupported by record evidence, and, in fact, as we shall talk
25 about, virtually every important finding of fact that your

1 Honor made was specifically discussed by the Fifth Circuit as
2 being supported by record evidence, and, similarly, the Fifth
3 Circuit did not question as unsupported by record evidence the
4 overall conclusion that your Honor reached that SB 14 was, in
5 fact, enacted with a discriminatory intent. In fact, in order
6 for the Fifth Circuit to take the position that it took, that
7 under the *Pullman-Standard* doctrine it would be remanding this
8 case to the Fifth Circuit -- to this Court, it did so because
9 it specifically and expressly found that there was sufficient
10 evidence in the record to support the conclusion that SB 14 was
11 enacted with discriminatory intent. Indeed, after reviewing
12 all of the evidence, the Fifth Circuit described its choice not
13 as one between reversal or remand, but between affirmance or
14 remand, and said it could just simply affirm your Honor's
15 decision on intent. The reason it did it was because it also
16 recognized that the district court has the exclusive province
17 to make inferences from the record. In fact, in footnote 22 it
18 acknowledged that multiple inferences might be drawn from the
19 record but it was only the district court's job to draw those
20 inferences.

21 So, the only issue on remand at this hearing is
22 whether the few pieces of subsidiary evidence that the Fifth
23 Circuit found, in its words, to be "infirm," made the
24 difference between your Honor's initial decision that SB 14 was
25 enacted with discriminatory intent or that it was not. And

1 while I think it's a little presumptuous for any of the parties
2 to suggest to the Honor -- to your Honor what -- what weight
3 you gave to specific pieces of evidence, an objective view of
4 your Honor's opinion and of the record concludes, without any
5 doubt, that this Court did not need the few instances of older
6 examples of state-sponsored discrimination or the instances of
7 discrimination in Waller County or the stray statements by
8 opponents of SB 14 that were deemed speculative, or by the
9 post-enactment statements by proponents of SB 14, or the *Bush*
10 *versus Vera* case to tip the scales from this finding of
11 discriminatory intent to a finding of no discriminatory intent.

12 Looking at your Honor's opinion, for example, there
13 are perhaps only two or three sentences in the entire
14 discussion that your Honor gave to discriminatory intent that
15 were in any way affected by the Fifth Circuit's opinion. And
16 nowhere in the opinion did your Honor ascribe any sort of great
17 weight to any of the so-called "infirm" evidence as compared to
18 what your Honor did when she described, for example,
19 Dr. Lichtman's testimony, that the combination of demographics
20 and racially polarized voting were instrumental in his
21 conclusion that SB 14 was enacted with discriminatory intent,
22 and as to that evidence your Honor specifically stated that she
23 was giving, quote, "great weight," end quote. Nothing like
24 that occurred in terms of any of the other shards of evidence
25 that the Fifth Circuit questioned.

1 And because Texas has stated in its brief that our
2 entire case, in its word, "unravels" without those few pieces
3 of evidence, I -- I did go back and -- and look at the closing
4 that I had the honor of giving a little more than two years
5 ago, and it was devoted entirely to the issue of discriminatory
6 intent. And out of the some 5,000 words that I uttered -- and
7 I know Genay took them down accurately -- only 60 of them were
8 in any way connected with any of the evidence that the Fifth
9 Circuit questioned. That -- those few pieces of evidence have
10 never been the crux of our case, and they were not essential to
11 your Honor's decision in the first place.

12 So, the issue before this Court, in the words of the
13 Fifth Circuit, is for your Honor to decide how those pieces of
14 evidence weighed in its original calculus. It is not, as Texas
15 would have it, for this Court to revisit issues of law or fact,
16 findings of fact, that have been definitively established, and
17 it's certainly not the time for Texas to throw into the record
18 new theories or new evidence, particularly when the Fifth
19 Circuit specifically said no new evidence will be admitted at
20 this proceeding.

21 So, Texas can no longer argue, as it persists to,
22 that there is a heightened standard applicable to cases of this
23 sort where only the clearest evidence can be used or that the
24 plaintiffs must prove that SB 14 was enacted -- enacted
25 unexplainable by anything but race, when the standard is that

1 plaintiffs need only prove that discrimination was a motivating
2 factor, not even a primary one, behind SB 14. Or that
3 plaintiffs must prove that SB 14 resulted in diminished voter
4 turnout; or that plaintiffs must prove that SB 14 made it
5 impossible for people to vote; or that the *Crawford* case
6 somehow gives Texas a free pass not to have to defend against
7 allegations of pretext. Every one of these legal issues has
8 been concluded by the Fifth Circuit adversely to Texas, and it
9 cannot argue otherwise in this forum, on this remand, by virtue
10 of the doctrines of the law of the case and the mandate
11 doctrine.

12 Similarly, Texas can no longer argue against a
13 baker's dozen of overarching facts which, taken together, fully
14 support this Court's original conclusion and will support this
15 Court's ultimate conclusion that SB 14 was enacted with
16 discriminatory intent; because each of these facts have been
17 found, not only by this Court, but have been discussed by the
18 Fifth Circuit as supported by record evidence. And these
19 include that the -- there had been a -- that SB 14 was enacted
20 in the background of a seismic demographic change in Texas that
21 showed the exponential growth of minority populations. That
22 racially prevalent -- racially polarized voting is prevalent
23 throughout Texas. That the drafters and proponents of SB 14
24 had full knowledge of the potential for a disparate impact on
25 the voting rights of African-American and Latino voters by

1 virtue of SB 14. That, despite this knowledge, the drafters
2 and proponents of SB 14 made choice after choice to make the
3 ID's that were acceptable under SB 14, those that were less
4 likely to be possessed by Black and Latino voters, and more
5 likely to be possessed by Anglo voters, and to reject those
6 sorts of ID's that were more likely to be possessed by Black
7 and Latino voters. That, armed with this knowledge, the
8 drafters and proponents of SB 14 rejected ameliorative
9 amendment after ameliorative amendment, and that the drafters
10 and proponents of SB 14 refused largely to explain the reasons
11 for their conduct. That while stating that SB 14 had been
12 modeled after the laws of Georgia and Indiana, the drafters and
13 proponents of SB 14 removed from SB 14 all of the ameliorative
14 provisions of those state statutes. That the drafters and
15 proponents of SB 14 tried to justify that bill with a series of
16 rationales that have been found by this Court and the Fifth
17 Circuit to be shifting and tenuous. That the same legislature
18 that passed SB 14, as Ms. Nelson will go into in greater
19 detail, passed other discriminatory legislation. That the
20 drafters and proponents of SB 14 used radical and unprecedented
21 procedures to steamroll the statute through the house -- both
22 houses. That SB 14, in fact, did have a discriminatory impact
23 in terms of both possession and burden of ID's, which impact
24 was exacerbated by the poor implementation of the law. And,
25 finally, that there is no record evidence to support the

1 specific provisions of SB 14 that made it so discriminatory,
2 which is a fundamental basis for your Honor's finding that
3 Texas has not met its burden to prove that SB 14 would have
4 been enacted even absent the discriminatory intent.

5 Now, this is aside from your Honor's having conducted
6 a multi-day trial, having listened to some 30 witnesses, I
7 believe, live, having accepted the expert testimony of Doctors
8 Lichtman and Dr. Minnite and Dr. Burton and Dr. Burden and
9 Dr. Davidson and George Korbel. Every one but one of them
10 testified live, so your Honor had the ability to assess the
11 credibility of those witnesses, whose opinions were crucial to
12 your Honor's finding. So, it's no surprise that the Fifth
13 Circuit thought that the issue was not one of reversal or
14 remand, but one of affirmance or remand, and thought that this
15 court is the only court to be able to draw the appropriate
16 inferences.

17 And we'll talk about those inferences. But I want to
18 emphasize and embrace that those inferences are largely based
19 on circumstantial evidence. And note I did not say "just"
20 circumstantial evidence or "only" circumstantial evidence,
21 as -- as Texas seems to say, because all of us trained as
22 lawyers know that circumstantial evidence is not a lesser
23 species of evidence. We're taught in law school that the
24 classic example of circumstantial evidence where before you go
25 to bed and you look out the window, it's dry outside; you wake

1 up, you look out the window it's wet outside; the
2 circumstantial evidence is that it rained. In many cases,
3 circumstantial evidence is as robust and as probative, if not
4 more so, than direct evidence, and in many cases, such as cases
5 where plaintiffs are trying to prove discriminatory intent, it
6 may be the only possible evidence, and that's been recognized
7 by the courts.

8 So, another thing that Texas is not able to argue
9 today in this hearing on this remand is that plaintiffs are not
10 able to prove their case solely by circumstantial evidence.
11 And plaintiffs are not -- I mean, I'm sorry -- Texas is not
12 able to argue, as it does, still, that this Court must infer
13 something against plaintiffs because they did not produce a so-
14 called "smoking gun." Both of those conclusions were firmly
15 rejected by the Fifth Circuit and cannot be raised by Texas
16 now.

17 The beauty of circumstantial evidence is that it
18 allows the finder of fact to draw strands of inferences from
19 the record evidence and combine them into a mosaic of, you
20 know, picture of discriminatory intent, as is the case here.
21 So, for example, here the Court can infer intent from the
22 result that SB 14 engendered. The Supreme Court in the *Bossier*
23 *Parish* (phonetic) case, in the *Dayton Board of Education* case,
24 indicated that this is a fair inference to be drawn. The
25 Supreme Court in the *Feeney* case stated that what a legislature

1 is up to may be plain from the results it achieves. And here,
2 of course, we not only have the results, but we have actual
3 evidence of actual knowledge by the drafters and proponents of
4 SB 14 of the potential for disparate impact.

5 The Court may also infer from the shifting and
6 tenuous rationales that were given that there was pretext at
7 work. And pretext indicates discriminatory intent, as the
8 Fifth Circuit specifically stated. And this Court may infer
9 from the numerous substantive and procedural departures from
10 the way you would think a legislature would act that something
11 else was going on; and in the words of the *Arlington Heights*
12 court, that there were "improper purposes" at play. And we
13 know what happened with SB 14. What did it need to get passed?
14 Well, first, you had to have Governor Perry issue an executive
15 order declaring a legislative emergency when no one could
16 testify as to the existence of an emergency. Then you had the
17 senate bypassing usual committee procedures. Then you had the
18 senate suspending for voting rights -- voting ID laws only the
19 hallowed and century-old two-thirds rule. Then you had the
20 house bypassing usual house committee procedures. And you had
21 the house getting rid of the filibuster rule. And you had the
22 conference committee bypassing its usual procedures and
23 enacting substantive changes in the law. And you had the
24 \$2 million fiscal note attached to the bill at a time when
25 there was a \$27 million budget deficit. As the Fifth Circuit

1 also said, that one would think that when a legislature is
2 acting with such speed and unprecedented procedures there would
3 be something really major going on, such as a \$27 million
4 budget shortfall, not the nonexistent issue -- the issue of
5 nonexistent voter fraud. But there's more.

6 As Texas likes to remind us, there was context.
7 There were six years that preceded SB 14, and Texas likes to
8 use those six years to show that, well, that's why it was okay
9 for the legislature in 2011 to bypass procedures and to speed
10 up the process, because everyone knew what was going on. Well,
11 first of all, never in those six years were the specific
12 provisions of SB 14 ever discussed. But beyond that, Texas
13 can't have it both ways. Knowing the history of what preceded
14 it in those six years, one would think, as your Honor did state
15 in her original opinion, that the legislature would ask for an
16 impact study in 2011. The 2011 legislature did not do that,
17 and, in fact, the only such study that was done by the State
18 was mysteriously buried. One would think, given the fact that
19 the 2011 legislature knew that past legislatures had been
20 unable to pass voter ID laws with strict provisions, that they
21 would seek ways to negotiate, to compromise, to build
22 consensus. Not only did they not do that, but they eliminated
23 the very vehicles that would build consensus, that would allow
24 for negotiation. And not only did they not compromise, but
25 they made choice after choice to make SB 14 more and more

1 discriminatory, not less discriminatory.

2 And one would think that with this history of six
3 years of discussions, when asked questions in 2011, the leaders
4 who were pushing this legislation would be able to answer them.
5 But Senator Fraser, the senate sponsor of SB 14, 27 times said
6 he was not advised when asked questions as to why certain
7 things were in or not in the bill. And Representative Harless,
8 the house sponsor of SB 14, could not in testimony in this case
9 recall answers to most basic questions as to SB 14. She could
10 not explain why SB 14 contained -- found acceptable military
11 and -- ID's and passports but not other federal, state, and
12 municipal ID's. She could not explain why she personally
13 tabled any number of ameliorative amendments. She could not
14 recall whether or not she thought voter fraud existed in 2011.
15 She could not recall why -- she could not recall why she found
16 acceptable, in a bill that she proposed in the same session as
17 SB 14, a voter ID bill which included many more ID's that were
18 acceptable than SB 14, but she could not recall why. The same
19 way Senator Patrick could not recall why he tabled any number
20 of ameliorative amendments; the same way Speaker Straus could
21 not explain why employee ID's were not acceptable; the same way
22 Bryan Hebert, the general counsel to the lieutenant governor,
23 could not explain why in 2009 any number of ID's, such as
24 employee ID's and student ID's, a broad range of ID's were
25 acceptable in 2009 but not acceptable in 2011.

1 Your Honor has a right to infer from this mountain of
2 evidence that from these -- from these -- the selective memory,
3 from this evasiveness, that there were improper purposes at
4 play. And your Honor has a basis to infer precisely what that
5 improper purpose was, and the Fifth Circuit has said so in no
6 uncertain terms, and this is on page 241 of its opinion, where
7 it says that:

8 "Faced with diminished voter turnout, the power in
9 party saw an opportunity to gain partisan advantage
10 by enacting a strict voter ID law that would limit
11 the rights of Black and Latino voters."

12 That is a -- that is conduct, as I think Ms. Nelson
13 will go into in greater detail, that has been used by the State
14 of Texas to stop minority advancement in voting in the past,
15 and it is a fair inference from this record for this Court to
16 find that the exponential growth of the minority voting
17 population, taken together with the cohesiveness of that
18 voting, I guess the party in power, was a motivating factor in
19 SB 14.

20 So, how does Texas respond to this? Well, first of
21 all, they try to present a new theory, the modernization
22 theory, that SB 14 was a culmination of a decades-long attempt
23 to modernize voting laws in Texas. Well, as I said earlier,
24 the Fifth Circuit absolutely precluded the introduction of any
25 new evidence, and that entire argument is supported -- to the

1 extent it's supported, which is a different issue -- by an
2 array of evidence which they've asked your Honor to take
3 judicial notice of. That's impermissible. It's impermissible
4 under jurisprudential tenets, even irrespective of the Fifth
5 Circuit's decision, because they have been litigating this case
6 for five years, in a number of different courts, and have never
7 presented that theory before, and they are not allowed to
8 present it for the first time here. And even if they were,
9 there is no basis for it. There is not a single witness who
10 has ever testified to it in depositions or at trial, and there
11 is not a single statement in the record of SB 14 that supports
12 that proposition.

13 Then they say that, oh, this is just partisanship,
14 not race. Well, the Fifth Circuit answered that also. The
15 Fifth Circuit said that preserving power through partisan means
16 can also be discriminatory.

17 Then they say, well, these procedural machinations,
18 everyone's done it. Well, the testimony of Senator Williams
19 and Senator Davis and any other number of witnesses was,
20 perhaps they have been done singly, but never in this
21 combination, two or three or four, let alone seven or eight of
22 them.

23 Then they say, well, there's a whole bunch of
24 arguments that we can show that would dispel any notion of
25 discriminatory intent. So, first they say that, look, the

1 proponents of SB 14 adopted an indigency affidavit exemption.
2 And that was removed only because Representative Anchia and the
3 democrats wanted it removed. Well, first of all, as we showed
4 in our papers, that that is false; Representative Anchia voted
5 against it, and it was -- it was voted the -- taking out the
6 indigency affidavit was at the control of the party in power.
7 But, secondly, it doesn't matter. We're not talking about the
8 bill -- prior versions of the bill here; we're talking about
9 the intent -- intent behind the final bill that was enacted in
10 law, and that final bill did not have an indigency affidavit.

11 Then they say that, well, the proponents of SB 14
12 agree to some ameliorative amendments. Well, the -- the key
13 word, of course, is "some." And the only major category of
14 additional acceptable ID's which they agreed to was the license
15 to carry.

16 Then they say, well, there were a number of minority
17 republican representatives and former democrats who are now
18 republicans, and they voted for SB 14. Well, that is probably
19 an artifact, if important at all, of the racially polarized
20 voting, but, as your Honor also recognized in her opinion, in
21 assessing the legislative intent, it is not the job of the
22 Court to assess the individual motivations of individual
23 representatives.

24 And, finally, they say, well, what is proof
25 positive -- and that's their language, "proof positive" -- is

1 that the proponents of SB 14 voted in the past, those who were
2 in the 2005 or 2007 or 2009 legislators -- legislatures -- they
3 voted for less discriminatory bills. Well, as the Fifth
4 Circuit also made clear, the only issue in this case is the
5 intent of the legislature that passed SB 14 in 2011, and the
6 choices that that legislature made that made it more
7 discriminatory than HB 218 or HB 1706 or SB 362 or Georgia or
8 Indiana's statute or, in fact, any other voter ID law in the
9 country. In that connection, it's never been the issue in this
10 case whether voter ID laws generally are good or bad or whether
11 the voters in Texas generally want voter ID laws or do not.
12 The only issue are the specific choices made by the legislature
13 that made the specific provisions of SB 14 more discriminatory.
14 And if the prior legislators were satisfied with the provisions
15 of SB -- of HB 218 or HB 1706 or SB 362, then why did they make
16 SB 14 so much more discriminatory? If they were satisfied with
17 the laws of Georgia and Indiana, then why did they strip from
18 SB 14 the very provisions that made those laws more
19 ameliorative? And the answer that Texas gives is very
20 interesting. The answer is: Well, we had an election in 2010,
21 and it was a landslide in favor of the republicans, and there
22 was a super majority now in the house of republicans, and we
23 could pass it; we could pass SB 14. It cannot be an answer to
24 a claim of discriminatory intent that a legislature was not
25 able to pass a law that was less discriminatory when it did not

1 have the votes, but was able to pass a law that was more
2 discriminatory when it did have the votes.

3 And, finally, your Honor, I'll talk a little bit
4 about impact. And the only reason I'm going to talk about
5 impact is because Texas persists in raising an issue which the
6 Fifth Circuit has said was demonstrably false. And that is
7 that plaintiffs were not able to produce a single person who
8 was adversely affected by SB 14. They cannot raise that issue
9 now. And as I did when I closed a couple of years ago, I would
10 just want to pay tribute to the people who we all are fighting
11 for: To the searing testimony of Sammie Louise Bates, who
12 talked about counting pennies with her grandmother in order to
13 pay a poll tax and discussed how she could not afford a birth
14 certificate because the \$22 was the difference between her
15 family having food or not, and they could not eat birth
16 certificates. The eloquence of Elizabeth Gholar, who insisted
17 that she had earned the right to vote. The heroism of Leonard
18 Taylor, who overcame physical disabilities to walk into this
19 court and press his claim for a right to vote. The dignity of
20 the late Margarito Lara and his sister, Maximina, who bared
21 before this court the most private details of their finances in
22 order to press their claim for the right to vote. And, of
23 course, the bravery of Reverend Peter Johnson, who talked about
24 the friends that he has in graveyards who died for the right to
25 vote.

1 As I said then, I would like to think that the good
2 men and women of the Texas legislature might have acted
3 differently if they heard this testimony. But reviewing this
4 record, your Honor, I am sorry to say it's not so. Because
5 they did hear this testimony, and the more they heard that sort
6 of testimony, the more discriminatory they made the law,
7 because they were driven by an impermissible and discriminatory
8 purpose to stifle the votes of Black and Latino voters and deny
9 them the equal opportunity to participate in the electoral
10 process. And that's wrong, and it's illegal, and it's
11 unconstitutional, and this Court should grant appropriate
12 relief.

13 Thank you.

14 **THE COURT:** Thank you.

15 **(Pause)**

16 **MS. NELSON:** Good morning, your Honor.

17 **THE COURT:** Good morning.

18 **MS. NELSON:** May it please the Court.

19 **THE COURT:** Yes.

20 **MS. NELSON:** Again, my name is Janai Nelson, I'm the
21 Associate Director-Counsel of the NAACP Legal Defense and
22 Educational Fund, and I'm appearing on behalf of our client,
23 Imani Clark.

24 If I may make two very brief points on the matter
25 that was discussed earlier regarding the United States' motion

1 for voluntary dismissal of the discriminatory impact claim --
2 intent claim. The question before this Court is whether Texas
3 acted with intentional discrimination in the enactment of SB
4 14; not whether SB 5 is a better law than SB 14 and not whether
5 it has less of a discriminatory effect than SB 14.

6 Second, to the extent that SB 5 has any relevance at
7 all, or any other law for that matter that comes before the
8 State legislature, it bears only upon remedy, and it bears only
9 upon the remedy for the effects claim. It has nothing to do
10 with this Court's charge to determine whether the legislature
11 acted with discriminatory intent.

12 And your Honor asked about whether SB 5 contains
13 expanded forms of identification, and the State acknowledged
14 that it does not. I might also add that while it is an
15 improvement on SB 14, it contains nonetheless very concerning
16 provisions, including one that creates a third degree felony of
17 potentially false statements on the declaration. So I just add
18 that to the discussion that was had earlier concerning the
19 United States' motion.

20 On the matter of intent specifically, the
21 overwhelming majority of factual findings in your meticulous
22 147-page opinion firmly support, unassailably support, a
23 finding of intent in this case. There's sufficient evidence as
24 the Fifth Circuit stated to support a finding that a cloak of
25 ballot integrity could be hiding a more invidious purpose. The

1 Court questioned only a slim subset of the evidence relied upon
2 from this Court among a voluminous record of evidence, and it
3 asked this Court to simply re-weigh the evidence, excluding or
4 reconsidering the particular pieces of evidence that it
5 questioned. It's also important to underscore that we're not
6 here to debate the merits of voter ID laws more generally,
7 which is what the State's filings on remand largely defend.
8 We're here because there's no credible evidence to justify the
9 exacting, strict, and stringent photo ID law that Texas enacted
10 in which race played at least a part in its decisions.
11 Instead, the record firmly establishes what Justice Ginsburg
12 appropriately called a sharply disproportionate impact on Black
13 and Latino voters. That impact was foreseeable, that impact
14 was avoidable. That impact was unjustifiable. And, it was
15 intended.

16 I'd like to use my time here to address some of the
17 new arguments that Texas raises on remand and also to highlight
18 the limited pieces of evidence that the Court questioned,
19 especially balanced against the overwhelming evidence that
20 remains.

21 In addition to the radical procedural departures that
22 Mr. Rosenberg described, there are really two broad categories
23 of evidence that cement the intent finding. The first is the
24 contemporary history of discrimination, and the second is the
25 actions of the legislature as opposed to the post-enactment

1 statements that the Fifth Circuit suggested you rely less upon.
2 Of course your Honor is intimately familiar with this record so
3 I will try to limit my discussion to a summary of the pieces of
4 evidence that stand in for the limited evidence question by the
5 Fifth Circuit, so I'll begin with a contemporary history of
6 discrimination. And let me start off by saying that neither
7 *Shelby County versus Holder, McCleskey versus Kemp*, or the
8 Fifth Circuit's decision in this case suggest that historical
9 discrimination is irrelevant. Instead the Fifth Circuit's
10 opinion limits the consideration of such discrimination and
11 says that we should not rely as much on long-ago history or
12 history dating back hundreds of years. For better or for
13 worse, this Court does not need to look back to history dating
14 back hundreds of years. The history of Texas's discrimination
15 against minority voters is long and it is living. In its en
16 banc opinion, the Fifth Circuit identifies several examples of
17 contemporary discrimination in Texas's elections process that
18 in its words augmented the circumstantial evidence of
19 discriminatory intent. These examples include Texas's purging
20 of minority voters from the voter rolls, its decennial racial
21 gerrymanders for the past 40 plus years in violation of the
22 Voting Rights Act, and Texas's ignoble distinction as the only
23 state with a consistent record of DOJ objections to at least
24 one of its statewide redistricting plans from 1980 up through
25 the *Shelby County* decision. In addition, as we note in our

1 findings of fact in paragraphs 24 and 25, during the 38 years
2 that Texas was covered under Section 5, DOJ issued over 200
3 objection letters blocking discriminatory voting changes that
4 Texas would have undertaken but for preclearance. These
5 include voting changes in more than 100 Texas counties ranging
6 from racially discriminatory candidate qualifications to
7 preregistration proof of citizenship requirements. The record
8 also shows that since at least as recently as 2000, DOJ issued
9 three objections to the State and 13 objections to local
10 jurisdictions, eight of which were explicitly based on Texas's
11 failure to prove that the changes were not motivated by
12 discriminatory intent. And finally, as the Fifth Circuit
13 remarked, the same legislature that passed SB 14 also passed
14 two laws found to be passed with discriminatory purpose. So
15 even if this Court puts aside Waller County as the Fifth
16 Circuit instructs, and even *Bush versus Vera* and *LULAC versus*
17 *Perry*, there still is copious evidence of historical
18 discrimination that in the Fifth Circuit's words provides
19 context to modern day events. Now, Texas tries to cast doubt
20 on the probative value of this history by arguing that it must
21 be tied directly to this legislature. But this contradicts
22 *Arlington Heights*, this also contradicts decades of case law in
23 which the actions of legislative bodies spanning decades and
24 even the actions of non-lawmakers has been used to establish
25 intent. And as noted, some of these acts were in fact

1 committed by the very same legislature that enacted SB 14.

2 Now, the second limited area of evidence that I'd
3 like to focus on is the actions of the legislature in lieu of
4 post-enactment statements by proponents and opponents which is
5 a category of evidence questioned by the Fifth Circuit. So
6 focusing only on those actions and omissions of SB 14
7 proponents, we could consider three categories of evidence that
8 fall roughly into these three buckets. One is the suspect
9 selection and rejection of various forms of voter ID. The
10 other is the legislature's failure to address SB 14's
11 foreseeable impact. And, finally, the myriad shifting and
12 tenuous rationales that the State proffered to justify SB 14.
13 I'll take each of these briefly in turn.

14 The record firmly establishes that the legislature
15 designed SB 14 with surgical precision to disproportionately
16 harm minority voters. Not only did Texas craft a law that
17 limited acceptable forms of ID to those that African Americans
18 were 305 percent less likely and Latinos 195 percent less
19 likely than Anglos to possess, it made very specific choices
20 that broadened Anglo voting. And these choices were not
21 justified by policy. Even Republican Senator Robert Duncan, an
22 SB 14 proponent, acknowledged that it was not necessary to
23 exclude student IDs or Government-issued employee IDs to serve
24 the stated goal of preventing voter fraud. The State
25 nonetheless asserts several new theories, first time on remand,

1 in an attempt to justify the legislature's choices. The State
2 argues that the legislature's narrow and limited choices under
3 SB 14 were made so that the law would be easier to administer.
4 But nowhere in the record is there any proof that any
5 legislature considered administrability as a justification for
6 SB 14's stringent provisions.

7 Moreover, it's not clear that SB 14 is even easier to
8 administer. The State also suggests, again for the first time
9 on remand, that SB 14's opponents were complicit in designing a
10 law in a manner that discriminated against Black and Latino
11 voters. And this is something that Mr. Rosenberg also
12 referenced but I'd like to go into a bit more detail. This
13 argument's not only untimely raised, it's also patently false
14 and misleading. Yes, Representative Ruben Hinojosa, a
15 Democrat, a Latino, introduced the gun carry permit ID. But
16 what the State ignores is that he introduced the gun carry
17 permit ID as part of a menu of various exceptions -- or
18 additional forms of ID, rather, to SB 14 that would make it
19 less onerous. The Republicans chose only the form of ID that
20 Anglos were more likely to possess and they affirmatively
21 rejected any of the other forms of ID that African Americans
22 and Latinos were more likely to possess. This demonstrates
23 that SB 14's proponents were only willing to accept amendments
24 that advanced their goal of discrimination. Even an indigency
25 affidavit that was introduced by Senator Duncan in the Senate

1 and that had passed in the Senate ultimately was stripped from
2 the law before it was passed and went through the conference
3 committee. The State also vastly asserts that SB 14 opponent
4 representative Rafael Anchia removed the indigency provision.
5 Again, as Mr. Rosenberg already established, that is in fact an
6 error. Mr. Anchia in fact voted against the removal of the
7 indigency affidavit. It was rather Representative Linda Harper
8 Brown and 42 other proponents who removed it and Mr. Anchia's
9 vote was misrecorded and ultimately corrected. That was not
10 disclosed by the State to this Court.

11 So as the Fifth Circuit noted, proponents of SB 14
12 have largely refused to explain the rejection of the amendments
13 and -- both at the time and in subsequent litigation. So
14 despite the State's best efforts to create a new narrative
15 around the design of SB 14, there's simply nothing in the
16 record to justify the upward departures and strictness that
17 characterize SB 14, other than the Republicans newfound super
18 majority that enabled them to pass what the Fifth Circuit
19 called, and I quote, "the strictest and perhaps most poorly
20 implemented voter ID law in the country."

21 The second bucket of evidence that demonstrates the
22 legislature's actions or omissions has to do with its awareness
23 of SB 14's impact and its failure to mitigate it. As the Fifth
24 Circuit held, the evidence supports the district court's
25 finding that the legislature knew that minorities would be most

1 affected by SB 14, and that SB 14's drafters nonetheless passed
2 the bill without adopting a number of proposed ameliorative
3 measures that might have lessened this impact. In response,
4 the State tries to plead ignorance here. For example, it says
5 that the State could not rely on the numbers that estimated the
6 number of Texans that did not possess driver's licenses or
7 personal IDs because that data could not be matched properly.
8 Even if this were true, it does not refute the abundant
9 evidence from which to infer awareness, as we detail in our
10 findings of fact in paragraphs 200 to 233, including the
11 testimony of SB 14 sponsor Representative Todd Smith who, for
12 example, stated that it was common sense that this would have a
13 disproportionate impact on minority voters, he did not need a
14 study to tell him this. And this is reinforced by the Supreme
15 Court's findings in *Reno versus Bossier Paris* (sic) where the
16 court held that the disparate impact of a legislative action is
17 often probative of why the action was taken in the first place
18 since people usually intend the natural consequences of their
19 actions. Nor does this erase the institutional knowledge that
20 the legislature gained starting with the legislative hearings,
21 continuing through the Section Five proceedings, up through the
22 passage of SB 14. The State nonetheless insists on several
23 very unlikely scenarios in which the legislature could have
24 somehow avoided knowledge of SB 14's impact. But to believe
25 this leap in logic would be to subscribe to a dereliction of

1 duty on the part of the legislature. It would also be to
2 suspend reality. As this Court held -- as the circuit held in
3 *United States versus Shafer* (phonetic), deliberate ignorance is
4 the equivalent of knowledge.

5 Finally, the State disputes that SB 14's proponents
6 were aware of its likely impact by saying that as a matter of
7 raw numbers, SB 14 impacts Anglo voters more than it does
8 African Americans and Latinos. So as a preliminary matter,
9 this is an improper attempt to relitigate the effects finding
10 that this Court found, the *en banc* Fifth Circuit found, and
11 that the Supreme Court has declined to review pending the
12 outcome of this proceeding. Here again the State is also
13 backwards on the facts. As we show in paragraphs 268 to 77 of
14 our findings of fact, a greater number of minority registered
15 voters lack SB 14-compliant ID as compared to Anglo voters who
16 comprise a larger portion of the electorate. Indeed,
17 Dr. Ansolabehere (phonetic) found that Latinos are three times
18 as likely and African Americans are four times as likely to
19 lack SB 14-compliant ID. Other experts and analyses that were
20 introduced at trial also confirm this and similar disparate
21 impacts. So not only does the State's argument completely
22 misunderstand proportionality, it also does not address the
23 question of whether SB 14 bears more heavily on one race. This
24 Court has found unequivocally that it does, and so has the
25 Fifth Circuit.

1 The final bucket of evidence that I'd like to focus
2 on are the tenuous and shifting rationales that the State has
3 proffered in support of SB 14. Again, without relying on any
4 of the post-enactment statements that were questioned by the
5 Fifth Circuit, the legislature's intent here is vividly
6 demonstrated by the dizzying array of rationales in support of
7 SB 14, starting with voter fraud to noncitizen voting, and then
8 the most recent issue of election modernization that as my
9 colleague Mr. Rosenberg established should be rejected out of
10 hand as new evidence. It's well-established and does not bear
11 repeating here that the impersonation fraud that SB 14 targets
12 is largely mythical. And most important that there was no
13 threat of such fraud in Texas at the time of SB 14's enactment.
14 The absence of this impersonation fraud not only supports your
15 original finding that Texas's aggressive fixation on this
16 elusory problem is proof of pretext, but it also is reinforced
17 by Texas's hands-off approach when it comes to mail-in ballot
18 voting. And with respect to mail-in ballot voting, we know
19 that is a method that is largely used by Anglo voters and also
20 the only sort of voter fraud for which there is any significant
21 amount of evidence. Indeed, the *en banc* opinion states that SB
22 14 did nothing to combat mail-in ballot fraud; although record
23 evidence shows that the potential and reality of fraud is much
24 greater in the mail-in context than with in-person voting.
25 Now, to explain why Texas did not address mail-in voting fraud

1 in SB 14, Texas says, well, it was addressed in 2011. Well, so
2 was impersonation fraud, it was addressed in 2011 as well. But
3 curiously it saw a reprise in the form of SB 14 just as
4 minority voting power was burgeoning. And it precipitated
5 Texas's six-year slog to ratchet up its voter ID laws. And
6 while the State can arguably choose to address the issue of
7 voter integrity seriatim or even preemptively, what it cannot
8 do is impose the harshest photo ID regime in the nation to
9 address what the Fifth Circuit called "the nonexistent problem
10 of voter fraud." That evinces an impermissible purpose.

11 The State also attempts to rationalize SB 14 now by
12 referring to isolated, unverified incidences of voter fraud.
13 Even if these singular anecdotal claims were true, they're
14 inconsequential in number and they do not undermine the
15 substantial data supporting disparate ID possession and the
16 foreseeable and avoidable harm to African American and Latino
17 voters. The State also offers as a variant voter fraud
18 rationale the notion that it was trying to prevent noncitizen
19 voting. However, SB 14 fails to address noncitizen voting
20 fully -- actually more than half of the IDs accepted under SB
21 14 can be lawfully obtained by noncitizens: the driver's
22 license, the personal ID, the gun carry permit, and the
23 military ID. So at bottom, preventing voter fraud is simply
24 not a credible justification amid all of these questionable and
25 tenuous justifications, particularly those that have been used

1 historically as pretexts for racially motivated devices. In
2 fact, the *en banc* opinion instructs that this Court is not
3 required "to accept that legislators were really so concerned
4 with this almost nonexistent problem."

5 Finally, again at the eleventh hour as we've
6 established, Texas offers the justification of election
7 modernization. And I want to address this -- even though the
8 Court should not consider it, I want to address this simply for
9 the fact that it actually supports a finding of discrimination.
10 For example, Texas points to the Carter-Baker Commission report
11 which supposedly catalyzed its interest in modernizing its
12 elections. But that report clearly warns that voter ID
13 requirements may present a barrier to voting by traditionally
14 marginalized groups, particularly the minorities and the poor.
15 In addition, the legislature failed to take up any of the
16 prophylactic measures suggested in the report that would
17 alleviate this disproportionate impact. So not only does the
18 State offer an ahistorical version of events, nothing in this
19 supposed effort to modernize Texas's elections or in the
20 growing trend of voter ID laws justifies SB 14's exceptionally
21 harsh provisions. Indeed, as the Fifth Circuit has already
22 held, the provisions of SB 14 fail to correspond in a
23 meaningful way to the legitimate interest that the State claims
24 to have been advancing through SB 14. It further held there's
25 evidence that can support a finding that the legislature's race

1 neutral reason of ballot integrity offered by the State is
2 pretextual. This is especially true when we consider Texas's
3 history of using poll taxes and literacy tests and other race
4 neutral reasons in the guise of ballot integrity to
5 discriminate against African America and Latino voters. This
6 was expressly cited by the Fifth Circuit, this was established
7 through the Plaintiffs' witness, Dr. Vernon Burton, which the
8 Fifth Circuit's opinion cites to directly.

9 I'd be remiss if I did not also underscore here the
10 overarching context of SB 14's enactment. To quote the *en banc*
11 court, "context matters." Sometimes there is a swirling
12 climate of racial antagonism behind an action that is relevant
13 to an examination of historical background. SB 14 was designed
14 in a context of severe socioeconomic racial disparities and a
15 deeply rooted history of discrimination by the State. It was
16 also designed against the backdrop of the seismic shift in
17 demographics that transformed Texas to a majority minority
18 state. The State would now like to suggest, again for the
19 first time on remand, that somehow the legislature was unaware
20 of this change in demographics, it was unaware until this
21 information was ultimately announced by the Census Bureau. The
22 implausibility of this suggestion is not only insulting to the
23 legislature, but also to the factfinder. The idea that
24 legislatures were somehow in the dark about the fact that Texas
25 was becoming only the fourth majority minority state in this

1 country in the twenty-first century defies common sense. It's
2 precisely the existential threat to Texas's political power
3 structure that motivated the legislature at least in part to
4 abridge and in too many cases deny the right to vote of African
5 American and Latino voters.

6 So to conclude, your Honor, the radical procedural
7 departures, the surgical precision in crafting SB 14, the
8 shifting and tenuous rationales, the foreseeable and avoidable
9 impact are all substantial proof of unlawful intent. This
10 intent is even more evident in the context of the seismic shift
11 in demographics and against the historical backdrop of state-
12 sponsored discrimination. This overwhelming proof includes
13 none -- and I repeat, none -- of the evidence that the Fifth
14 Circuit questioned in its *en banc* opinion. Rather, it leads to
15 the ineluctable conclusion that SB 14 was enacted at least in
16 part with race in mind. And the State has failed to show that
17 SB 14 would have been enacted otherwise.

18 What's more, your Honor, in a climate where voter
19 fraud and vote rigging is thrown about to justify infringements
20 on the right to vote without any check, we cannot afford to let
21 stand a law that was enacted, at least purported to be enacted,
22 on these sorts of falsehoods, let alone a law that has such a
23 clear intent to diminish the ripening political power of
24 African Americans and Latinos, just as they were beginning to
25 exercise it. This Court has the benefit of a full record and a

1 clear road map from an *en banc* court to guide its decision to
2 once again find that SB 14 violates the Fourteenth and
3 Fifteenth Amendments of the Constitution, and also of Sections
4 2 and 3(c) of the Voting Rights Act. Thank you.

5 **THE COURT:** Thank you. Mr. Dunn, are you next or
6 Mr. Garza?

7 **MR. DUNN:** Yes, your Honor. May it please the Court,
8 I just want to take a few moments before the Court not to
9 rehash the evidence that's been discussed, but to address this
10 issue that comes up not just in the motion presented today but
11 in the briefing filed on intent in this case that somehow or
12 another our work here is done. Justice exists in the ether for
13 us to discover, and whether it's natural law or, if it's your
14 inclination, God's law, it's all of our duties to go and find
15 it. And we have searched for it in this case. The United
16 States has an entire department named after justice, and
17 nevertheless we are here today looking for it everywhere we can
18 find it. Justice has one safe harbor of last resort, and that
19 is an Article Three District Court. And we are here today
20 asking that it be imposed, not to be mean, not to call names,
21 but to improve our community and to improve our State. Now,
22 justice is something that Texas hasn't always found its way to;
23 and although I, a product of this State, am proud of its
24 existence and proud of its strengths, and I can still recognize
25 its weaknesses. I know your Honor is also a product of this

1 State. And we can recognize the soft underbelly of the
2 mistakes that our State sometimes makes. But in this case,
3 there is a harm to be repaired and it left -- and it has been
4 left unrepaired. In 2011, the State of Texas crashed through
5 the barrier of protection for voters' rights in Texas, and it
6 did so both in harm and in process. And although as a result
7 of this litigation in this Court, higher courts, some of the
8 advancement of the State against the rights of individuals to
9 cast the franchise has been pushed back may nevertheless remain
10 in the walls of the mission, and they do so because they
11 remedy. Although entered up to date is a vast improvement over
12 what the legislature sought out to do, it nevertheless subjects
13 people, as I stated before, to the architecture of Senate Bill
14 14. Now, we stand here as participants in democracy. And we
15 stand here at a point in time in our nation and as a people
16 where we again take two steps forward, yet one step back. And
17 we note how the cut and thrust of politics often harms and
18 tears apart families and regular citizens who go about their
19 business living their lives participating in democracy the one
20 way they know how, that's casting a vote. Texas must be fully
21 removed from the mission and the process must be restored to
22 something the Voting Rights Act protects. That has to be done
23 in two ways.

24 First, there has to be a remedy put in place that
25 fully addresses the harm and the architecture that Senate Bill

1 14 sets apart. For example, individuals who have student IDs
2 are nevertheless subjected to the declaration process. People
3 who have Government IDs are nevertheless subjected to the
4 declaration process. And now would Senate Bill 5 become law,
5 they'd be subjected to a whole new round of criminal offenses,
6 criminal investigation, and voter intimidation. That result
7 must be repaired. But what often doesn't get much attention in
8 the course of this case is the process. The process has to be
9 respected, because what happened in 2011 is the elected
10 leadership of this State was hijacked. People who had been
11 chosen by citizens of this State through democracy to serve
12 their interest, to vote for their position, to argue their
13 points of view, were quieted. They were locked out of the
14 room. They were excluded from the amendments. They were fed
15 garbage and they were told wrongful answers to questions. In
16 fact, they went so far as to even tell members of the
17 legislature that the Secretary of State's office hadn't
18 analyzed the effect of the bill, when in fact they fully had
19 and knew what the effect of the bill would be.

20 Three-C relief, the relief that comes from a finding
21 of intentional discrimination gets at fully repairing the harm,
22 which is critically important. But it also gets at fully
23 repairing the process. We don't know -- because certain
24 leadership members deprived us of this opportunity, we don't
25 know what the legislature would do in the regular order of

1 business, in the regular consideration of facts and
2 circumstances, and in the free and fair debate that our
3 democracy demands. We don't know that. But we will when this
4 Court finds discriminatory intent. Now, Mr. Rosenberg and
5 Ms. Nelson and others have artfully laid out the underlying
6 facts that support this finding of intent. The *en banc* court
7 of appeals as has been noted has found that there's substantial
8 evidence of discriminatory intent, and we suggest as I
9 mentioned earlier that the Court's task is not altogether that
10 difficult to this stage. If I may suggest, an opinion need
11 only outline the facts as recognized by the Fifth Circuit that
12 support discriminatory intent, note that this Court has no
13 longer considered the few pieces of evidence the Fifth Circuit
14 has found to be infirmed, and that nevertheless having sat here
15 for days on end, looked in the faces of individual witnesses,
16 saw the refusal of legislatures to explain or otherwise
17 describe what it is and why they did it, the volumes of
18 testimony by experts in reviewing the hundreds and thousands of
19 pages in evidence, this Court was in a unique condition to know
20 exactly what happened here because of the evidence, because of
21 the site is here in Texas, and because of the experience of
22 this State, this Court knows what happened with Senate Bill 14.
23 It ought to be declared so we can get to the business of
24 resolving all of the harm that this legislature in 2011
25 required. We appreciate the Court continuing to put forth the

1 hard effort to reach that conclusion.

2 **THE COURT:** Thank you.

3 **MR. GARZA:** Jose Garza for the Taylor Plaintiffs.

4 **THE COURT:** Morning.

5 **MR. GARZA:** May it please the Court, in the words of
6 the United States in this case, the State of Texas enacted SB
7 14 to be the strictest, least forgiving identification bill in
8 the country. At trial in this case, Margarito Lara testified
9 about the importance of voting in his life, about getting up
10 early on election day and walking to the polling place where
11 people knew him, where he knew them, and where he was allowed
12 to vote every day, every election, until SB 14 was fully
13 enforced in this case. Unfortunately, in June of 2015,
14 Margarito Lara passed away and never was able to cast a vote in
15 Texas again. While the Taylor Plaintiffs stand by the
16 presentations of Mr. Rosenberg and Ms. Nelson, we would urge
17 the Court to recall that testimony and find that Texas enacted
18 SB 14 to abridge the ability of Hispanics and African American
19 Texans to exercise their constitutional right. Thank you, your
20 Honor.

21 **THE COURT:** Thank you. Is that all from the
22 Plaintiffs at this point?

23 **(No audible response)**

24 Okay, Ms. Colmenero, are you going to proceed for
25 Texas?

1 **(Pause)**

2 **MS. COLMENERO:** May it please the Court, this Court
3 should reject the Plaintiffs' charge that the Texas legislature
4 enacted SB 14 with the invidious intent to burden minority
5 voters. The evidence in the record demonstrates that SB 14 was
6 enacted because the Texas legislature wanted to prevent voter
7 fraud and protect the public's confidence in elections.
8 Plaintiffs' theory during trial, and as you heard here today,
9 has been that Republicans and the Texas legislature, fearful of
10 a rise in the political power of Democratic-leaning minority
11 voters in the State, turned to photo ID requirements to
12 entrench Republican power by disenfranchising minority voters.
13 But there is no evidence in the record to support this theory.
14 In fact, it is based on nothing more than rank speculation. To
15 prove their claim of discriminatory purpose, Plaintiffs have
16 the burden to show that the Texas legislature enacted SB 14
17 because of, not merely in spite of, its adverse effects upon
18 minority voters. This means that the Plaintiffs have to
19 actually show that the legislature's agenda was to suppress
20 minority political participation, not that it was just a
21 possibility. Even with unprecedented discovery into
22 legislators' communications and personal files you would think
23 that the Plaintiffs would have something to show this Court
24 today. Instead, this theory continues to fall apart in the
25 face of the public justifications that were provided at the

1 time of the passage of SB 14. Between 2005 and 2011 dozens of
2 Texas senators and representatives considered and voted in
3 favor of voter ID legislation. The Plaintiffs have no evidence
4 that a single legislator, let alone a majority of them, acted
5 for racial discriminatory purpose through the passage of SB 14.
6 And it is unlikely that such an elicit motive would permeate
7 the legislature yet remain hidden over the course of four
8 legislative sessions. As a result, a full consideration of the
9 evidence leads to only one conclusion here today, and that is
10 that the Texas legislature did not enact SB 14 with an
11 invidious purpose.

12 The Fifth Circuit remanded this case in order to
13 allow the Court to reconsider the issue of whether SB 14 was
14 enacted with a discriminatory purpose. The Fifth Circuit held
15 that this Court cannot rely on historical instances of
16 discrimination, it cannot rely on discriminatory acts of
17 persons outside the legislature, it cannot rely on legislative
18 support for unrelated allegedly discriminatory bills and,
19 finally, it cannot rely on speculation by some SB 14 opponents
20 that the bill proponents acted for discriminatory purpose.
21 This means that the State here today is not precluded from
22 making any argument on remand. The Plaintiffs have made a
23 claim of discriminatory intent. We oppose that claim, and that
24 means we can make any argument in support of it in opposition.
25 And the Fifth Circuit said that this Court must consider the

1 evidence in the record anew on remand and cannot rely on any of
2 the inferred evidence the Fifth Circuit has discredited.

3 Courts presume the constitutionality of legislative
4 actions, and to overcome the presumption of constitutionality
5 to invalidate a statute is no small task. And this task is
6 even more problematic when you consider examining whether a
7 body the size of the Texas legislature worked together to pass
8 a facially neutral law because of discriminatory motives. The
9 Plaintiffs evidence is nowhere sufficient to overcome this
10 hurdle. The record in this case doesn't contain any evidence
11 of contemporaneous statements by any decision-maker which
12 suggests discriminatory purpose or intent. In fact, the record
13 demonstrates just the opposite. During the 2011 session, bill
14 sponsors and bill proponents for SB 14 repeatedly stated that
15 its purpose was to deter and detect voter fraud and safeguard
16 voter confidence in the election system. You see that through
17 the statements from Senator Fraser, the Senate sponsor of the
18 bill, who stated that the purpose of the law was to protect the
19 integrity of the ballot box. Lieutenant Governor Dewhurst
20 stated that it was the intent of the legislature and his intent
21 to pass a voter ID bill which reduced fraud and improved voter
22 confidence. And Representative Harless, the House sponsor of
23 the bill, stated that a voter ID bill would deter and detect
24 fraud in the polls and protect voter confidence.

25 There is no evidence in the legislative record that

1 SB 14 was enacted to harm minorities. This evidence is
2 confirmed by Plaintiffs' own witnesses in this case.
3 Representative Anchia testified at trial that he did not hear
4 anyone make a statement in public or private suggesting that SB
5 14 had a discriminatory intent. Senator Davis testified
6 similarly at trial. And so did Representative Veasey, the lead
7 Plaintiff in this case, who admitted he had no evidence that
8 any House member, other than a single person, voted for SB 14
9 for the purpose of harming minority voters. But Representative
10 Veasey only points the finger at one member, and he offers no
11 explanation for why he does so. He also indicated that he had
12 no evidence that any member of the Senate voted for SB 14 for
13 discriminatory purpose. And voter ID opponents conceded on the
14 record during legislative debates that voter ID proponents had
15 valid purposes. You see that through the testimony of Senator
16 Whitmire who stated during a committee hearing that he didn't
17 believe it was anyone's intent to disenfranchise voters.
18 Senator Ellis agreed with Senator Fraser that he wanted to
19 ensure that minority and elderly voters all have the right to
20 vote under SB 14. And Representative Giddings stated during
21 the 2007 debates that the intentions of voter ID proponents
22 were good and honorable and that she believed it was a sincere
23 attempt on their part to stop voter fraud. We are unaware of a
24 single case where opponents of the legislation openly confirmed
25 the proper purpose of proponents of the legislation. And this

1 evidence is important because it offers no support to the
2 Plaintiffs' theory that the legislature, the Lieutenant
3 Governor, the Governor, and agency officials conspired together
4 to enact a law that would disenfranchise minority voters.

5 As we go through the evidence here today, we will
6 examine it using the lens of the *Arlington Heights* factors.
7 These factors are not as the Plaintiffs suggest elements of
8 their claim. They are not intended to allow parties to draw
9 inferences of discrimination from neutral facts without a
10 complete analysis. Procedural departures, for example,
11 standing alone are not inherently discriminatory. Plaintiffs
12 still have the burden here today to demonstrate that the
13 legislature used such procedural departures because it had an
14 invidious purpose. *Arlington Heights* and *Feeney* also tell us
15 that even if the decision-maker was aware of the disparate
16 impact on a particular group, that is still not enough to
17 demonstrate discriminatory intent. And here in this case we
18 don't even have knowledge by the legislature of that impact.
19 And that is not enough to find discriminatory purpose,
20 especially with the presumption of constitutionality.

21 So let's look at the evidence that the legislature
22 had before it on SB 14's impact. Election officials from
23 Georgia and Indiana testified that there was little evidence of
24 disenfranchisement in their respective states. Moreover, the
25 legislature heard testimony that similar voter ID laws did not

1 result in disenfranchisement. And significantly the
2 legislature heard from Plaintiffs' own expert,
3 Dr. Ansolabehere, that exclusions from voting resulting from
4 voter ID laws are exceptionally rare. The legislature also
5 considered real-world empirical studies showing that voter ID
6 did not negatively affect the ability of those entitled to
7 vote. The legislature was entitled to credit this testimony
8 and other evidence before it during the history of SB 14. It
9 is true that this Court and the Fifth Circuit concluded that SB
10 14 had a discriminatory effect on the right to vote on account
11 of race under Section 2. This conclusion, however, was based
12 on statistical studies done after the enactment of SB 14. No
13 one presented this evidence to the legislature before it passed
14 SB 14. In fact, the Texas legislature received testimony that
15 warned against relying upon the very same database matching
16 techniques employed by Plaintiffs' experts in this case. And
17 the facts here are unlike those that are present in the *McCroy*
18 *and North Carolina* where the legislature asked for evidence of
19 disparate impact and then passed legislation because of that
20 information. Further, contemporaneous statements made by the
21 legislators during the legislative debates on SB 14 demonstrate
22 that legislators were not aware of the alleged disparate impact
23 SB 14 would have. This is abundantly clear from the statement
24 where bill opponents like Senator Ellis made on the record
25 where he stated he could not prove SB 14 would have a disparate

1 impact. But even in the face of this evidence from their own
2 witnesses, Plaintiffs suggest that somehow the legislature knew
3 of the alleged discriminatory impact because SOS provided an
4 analysis to Lieutenant Governor Dewhurst that confirmed the law
5 would have such an impact. But this is not true because
6 Dewhurst received no such analysis. As the Lieutenant Governor
7 explained, the Secretary of State provided to his office an
8 unsourced estimate about the percentage of registered voters
9 who lacked a driver's license or personal ID. The Secretary of
10 State also warned that its matching data was unreliable because
11 they were having problems matching the list of driver's
12 licenses to the list of registered voters. The legislature was
13 under no obligation to credit this information which did not
14 accurately show the current rates of ID possession in the
15 State.

16 Plaintiffs also point to the testimony of
17 Representative Smith, one of the co-sponsors of voter ID
18 legislation, suggesting that he had a database analysis
19 performed showing the discriminatory impact of SB 14. But the
20 Plaintiffs' reliance on his testimony is misguided. There is
21 no evidence that this analysis was public or that any other
22 legislator received the same estimate. Although Representative
23 Smith said he probably would have mentioned it at a committee
24 hearing, we've combed the record. There's no evidence in 4,500
25 pages of legislative hearings of such a mention by him. And

1 although years later Representative Smith testified in a
2 deposition that it was common sense minorities would be likely
3 to be in this group, this stray statement made by a single
4 member of the legislator voting for SB 14 is not the best
5 indicia of the entire legislature's intent. And that's because
6 contemporaneous statements made at the time SB 14 was
7 considered by the legislature indicate that members of the
8 Senate and the Texas House concluded that SB 14 would not have
9 such a disparate impact. Under questioning from Senator Ellis
10 regarding the discriminatory impact, Senator Fraser testified
11 that he was confident it would not have such an impact. And
12 the same is true with Representative Harless who also testified
13 during a floor debate she believed the bill would not put
14 minorities in a worse position in terms of electoral power.
15 Without knowledge of the disparate impact, this case is not
16 even close to the facts in *Feeney*. And without evidence of
17 knowledge or awareness, this means that the Plaintiffs cannot
18 overcome the presumption of constitutionality to demonstrate
19 that the legislature enacted the legislation because of the
20 disparate impact.

21 The Fifth Circuit also made clear that when
22 considering the historical background of SB 14 for purposes of
23 the *Arlington Heights* analysis, this Court should only consider
24 recent acts of racial discrimination by the legislature.
25 Plaintiffs continue to ignore this instruction. They continue

1 to rely on purging laws from the seventies and laws enacted
2 prior to 1975.

3 **THE COURT:** But didn't the Fifth Circuit rely on some
4 of that, or no?

5 **MS. COLMENERO:** Your Honor, they mentioned it in
6 their opinion but they cautioned this Court that when you are
7 looking at the evidence again on remand, you have to look at
8 only recent acts of racial discrimination. And Plaintiffs here
9 continue to rely on discrimination by local jurisdictions.
10 They also rely on DOJ objection letters directed to local
11 jurisdictions which are not evidence of official acts taken for
12 invidious purpose by the Texas legislature. Plaintiffs also
13 rely on *LULAC versus Perry*, *Perez versus Perry*, and a new case,
14 *OCA Greater Houston* (phonetic), but none of those cases are
15 discriminatory purpose cases. And the Plaintiffs also cannot
16 rely on the now-vacated opinion from the Section 5 preclearance
17 redistricting case, which is *Texas versus U. S.*, which
18 purported to find that the 2011 legislature created two
19 redistricting plans with a discriminatory purpose. The *Texas*
20 *versus U. S.* was a declaratory judgment action brought under
21 Section 5 of the Voting Rights Act, and this meant that the
22 State went in with the presumption under the statute that --
23 and Texas had the burden to disprove discriminatory intent. In
24 ruling against Texas, the court was not asked to make an
25 affirmative finding on the issue of discriminatory intent. And

1 as the case citation indicates, this decision was vacated
2 following *Shelby County*. So none of these examples that the
3 Plaintiffs point to qualify as recent acts of discrimination by
4 the legislature.

5 And this Court must also look at the sequence of
6 events leading up to SB 14, and the sequence of events support
7 the legislature's stated purpose. There was a direct
8 explanation for the push for voter ID legislation and it was
9 the 2000 presidential election that spurred a nationwide drive
10 to enhance election integrity. The 2000 election and its
11 recount process drew national attention to the problem of
12 antiquated and ineffective voting procedures. Thus, there were
13 significant, influential events that occurred during this
14 timeframe that motivated the legislature to address the issue
15 of voter fraud. The first significant change following the
16 2000 presidential election was the introduction of HAVA; then
17 the Carter-Baker Commission convened in 2004 and noted that the
18 electoral system cannot inspire public confidence and no
19 safeguards exist to deter or detect fraud or to confirm the
20 identity of voters. *Purcell* and *Crawford* were both issued by
21 the Supreme Court and echoed much of what was expressed in the
22 Carter-Baker Commission report. And at the same time as these
23 changes were occurring, a number of states began adopting laws
24 that followed the recommendation of the Carter-Baker Commission
25 and require that a voter provide a photo ID before casting a

1 ballot. Georgia and Indiana adopted voter identification laws
2 in 2005. And in 2011, legislation had been introduced in
3 nearly 34 states.

4 Finally, public opinion in the nation and in Texas
5 supported voter ID legislation. In February, 2011, the support
6 for voter ID laws remained overwhelming. Seventy-five percent
7 of Texans supported voter ID, and 58 percent of Democrats
8 favored a photo voter ID law.

9 **THE COURT:** But there can be public support for
10 things that are unconstitutional, correct?

11 **MS. COLMENERO:** Your Honor, there could be, but what
12 the legislature was seeing at the time that they were
13 considering the 2011 legislation was out there was a vast
14 majority of Texans, as well as a nation, who were in favor of
15 voter ID legislation, and that is part of the sequence of
16 events that went behind the legislature moving to consider that
17 legislation.

18 And Plaintiffs' own witnesses described the pressure
19 on Republican legislators in Texas to enact a voter ID bill.
20 Mr. Wood testified that there was enormous pressure on members
21 of the legislature in 2011 to vote for SB 14. Representative
22 Smith also testified that Republican members were concerned
23 that if they did not pass a voter ID bill, they would lose
24 their seats.

25 **THE COURT:** But that's okay if you're doing the right

1 thing, right? You can't do something unconstitutional or that
2 might have a discriminatory effect or something that's not
3 proper just because your constituents want you to vote a
4 certain way, right? I mean, I get your argument but we --
5 yeah, it's kind of a fine line there.

6 **MS. COLMENERO:** And, your Honor, we mention these
7 instances because it's this sequence of events that put into
8 context the landscape that the legislature was facing in 2011,
9 and not just in 2011 but when they tried to pass voter ID
10 legislation in 2005, 2007, 2009, and then finally in 2011.

11 And what's significant is that the Plaintiffs ignore
12 these events that were occurring while the legislature
13 considered voter ID legislation and continued to suggest that
14 the real motivation for SB 14 was to thwart the voting power of
15 minority voters. But there is no evidence to support this
16 theory, and that's because the recognition of Texas's status as
17 a majority minority state was given months after the 2005 voter
18 ID legislation was introduced, and more than three months after
19 it was passed by the Texas House. And this is evidence that
20 supports the legislature's stated purpose of improving
21 confidence in the electoral system because it sought to pass
22 this legislation during its election modernization effort.

23 The Plaintiffs contend that SB 14 was also subject to
24 numerous and radical procedural departures. But the history
25 leading up to the passage of SB 14 explains that there were

1 legitimate, nondiscriminatory reasons for certain procedural
2 maneuvers. But to understand why the legislature did certain
3 things and took certain actions, this Court must look at the
4 decade-long effort to pass a voter ID statute. In 2001, the
5 first voter ID bill was introduced by a Democrat in the House
6 and this bill was referred to committee, but no further action
7 was taken. In 2003, although the legislature did not consider
8 a voter ID bill, that session was important because the
9 legislation adopted laws aimed at strengthening the Texas
10 election system. In fact, the legislature acted by passing
11 legislation to prevent mail-in ballot fraud during the session.
12 During the 2003 session, the legislature passed HB 54 which
13 amended provisions of the Election Code and Penal Code relating
14 to election fraud and early voting by mail procedures. This is
15 an important fact because the Plaintiffs have argued that the
16 legislature's concern with in-person fraud was pretext because
17 there is a bigger problem with mail-in voter fraud and the
18 legislature never addressed it. But the Plaintiffs are wrong
19 because the legislature addressed mail-in fraud in 2003, 2007,
20 and in 2011. In the 2005 legislative session the legislature
21 proposed HB 1706. This voter ID bill was modeled after the
22 recommendations of the Carter-Baker Commission's and sought to
23 prevent in-person voter fraud. HB 1706 allowed photo and non-
24 photo ID. Democrats opposed the legislation immediately and
25 looked for procedural mechanisms to block the bill. After the

1 bill passed the Texas House, Democrats threatened to kill the
2 bill by using the two-thirds rule and the bill ultimately died
3 in the Senate. Voter ID was reintroduced in the 2007
4 legislative session and HB 218 was passed in the Texas House.
5 The proposed legislation allowed for photo and non-photo ID,
6 and this bill died in the Texas Senate when Democrats blocked
7 the bill from being debated on the floor through the Senate's
8 two-thirds rule. The 2009 session brought a new voter ID bill
9 which was SB 362. Senator Fraser introduced the bill and this
10 bill was far more lax than the Indiana law upheld by the
11 Supreme Court because it provided for the use of non-photo ID.
12 The bill was proposed despite the preferences of many
13 Republicans for a photo-only voter ID law as an attempt to
14 compromise with the Democrats. The Senate set aside the two-
15 thirds rule for consideration of the bill and sent the bill to
16 the Committee of the Whole. The Senate passed the bill but
17 then it died in the House after it was chubbed to death for 26
18 hours over five days. When the 2011 session came about, the
19 legislation had evolved. The 2005, 2007, and 2009 bills
20 allowed for a combination of non-photo and photo ID. SB 14 had
21 evolved into a photo-only law because there was increasing
22 demand for such a law and because Democrats had taken the
23 compromise off the table in past sessions. When it became
24 clear that the Democrats were not interested in compromise, and
25 after Republicans had obtained overwhelming majorities in both

1 houses of the Texas legislature, Republicans chose to pursue
2 their policy preference. And while the Plaintiffs focus on
3 several procedural departures from which they contend this
4 Court can infer discriminatory intent, the Plaintiffs are wrong
5 as the evidence shows that all of the alleged departures were
6 done to help further the democratic process and get SB 14 to an
7 up or down vote.

8 The Governor designated SB 14 as an emergency item in
9 order to avoid the chubbing incident that occurred during the
10 2009 session with SB 362. Designating an item as an emergency
11 is not unusual in the Texas legislature. It is a calendaring
12 tool that has the effect of allowing earlier consideration of
13 the voter ID bill in the House. In fact, in 2011, two other
14 matters were also designated as emergency items, and the
15 emergency designation helped achieve the goal of getting the
16 issue of voter ID behind the legislature in 2011 so they could
17 turn to other matters. Because the Senate anticipated that
18 Democrats would again use the Senate's two-thirds rule to block
19 consideration of the bill, Republicans designated SB-14 as a
20 special calendar item. The Senate disbanded the two-thirds
21 rule in order to allow the Senate to actually consider the
22 bill. And the two-thirds rule is a legislative calendar
23 management tool utilized to control the flow of legislation to
24 the Senate floor. Because Democrats had either threatened or
25 utilized the two-thirds rule to kill previous voter ID bills,

1 this procedural workaround was used to get SB 14 to an up or
2 down vote in both houses of the legislature. And the record
3 evidence reveals that the legislature also disbanded the two-
4 thirds rule in the same session to secure the passage of a
5 budget, which shows that there was nothing unusual or
6 discriminatory about working around the rule when it was being
7 abused by the minority party, in this case the Democrats. The
8 Senate resolved into the Committee of the Whole to help
9 expedite consideration of SB 14. The Committee of the Whole
10 allows any Senator to introduce evidence and to question
11 witnesses and help expedite consideration of legislation.
12 Despite the already voluminous record, the Committee of the
13 Whole heard testimony from numerous witnesses in favor and
14 against the bill. This was not an unusual procedure but is
15 regularly used in the Texas Senate, and was particularly
16 appropriate for voter ID given the past six years it had been
17 debated. And the same is true with the House's use of a select
18 committee to hear SB 14. The use of this procedure did not
19 limit participation by minority members to the benefit of SB-14
20 supporters. In fact, the opposite was true. The Speaker chose
21 Representative Veasey as the Vice-Chair of the Committee which
22 allowed him the opportunity to voice his concerns and directly
23 influence the legislation.

24 Plaintiffs also contend that SB-14 contained a fiscal
25 note despite the State budget shortfall that year, but there is

1 no procedural rule that barred fiscal notes from being attached
2 to bills and Plaintiffs ignore that \$2 million that SB-14
3 directed the Secretary of State to spend on voter education was
4 already in the possession of the agency and no additional State
5 expenditures were necessary.

6 These procedural maneuvers had nothing to do with
7 discrimination and they had everything to do with ensuring that
8 the democratic process remained at work in the Legislature in
9 2011. Nor do these procedures suggest that there was an
10 eagerness to rush legislation through with limited debate and
11 review.

12 The exact opposite is present in the record here.
13 When the 2011 Legislature took up SB-14 it had been debated for
14 six sessions and a record was created that spanned more than
15 4,500 pages. In fact, Democratic members testified at trial
16 that SB-14 opponents had ample opportunity to express their
17 concerns and engage in debate about SB-14. So there is no
18 evidence to support the idea that radical procedural departures
19 were even present in 2011.

20 Plaintiffs also argue that the Legislature's failure
21 to adopt amendments by Democratic members is evidence of
22 discriminatory purpose. This is not true for several reasons.

23 First, the Plaintiffs failed to recognize that many
24 -- many amendments proposed by Democrats were adopted in the
25 Texas Senate. For example, Senator Hinojosa proposed an

1 amendment to allow concealed hand gun permits to be used as
2 voter ID and this amendment was unanimously adopted.

3 Senator Lucio offered an amendment to allow the use
4 of certain expired IDs and this amendment was also unanimously
5 adopted.

6 And Senator Davis proposed an indigent affidavit
7 exception and although she withdrew this amendment it was
8 incorporated into a more comprehensive amendment offered by
9 Senator Duncan, and this amendment was adopted unanimously by
10 the Texas Senate.

11 So there's no evidence that the Legislature chose
12 certain IDs based on rates of possession by different racial
13 groups in terms of their consideration of amendments.

14 And the Plaintiffs also ignore that other amendments
15 were rejected by the Legislature for legitimate reasons. The
16 Senate considered the issue of EIC implementation in the
17 context of an amendment that would have required evening and
18 weekend hours at drivers license offices around the State.

19 Senator Fraser stated during the floor debates that
20 he rejected this amendment because he did not believe SB-14 was
21 the proper place to debate DPS operations.

22 Another tabled amendment would have prohibited State
23 agencies from charging fees for issuing documents used to
24 obtained photo IDs such as a birth certificate. Lieutenant
25 Governor Dewhurst indicated that it was his preference that the

1 issue of implementation be left to the responsible agency and
2 that is why that amendment was rejected.

3 Another tabled amendment would have required the
4 Secretary of State to analyze annually SB-14's impact on
5 voters. The Legislature rejected this amendment because it
6 felt the better course was to examine the impact of SB-14 after
7 it had been in place for a couple of years and in any event
8 this study would not have been feasible given the data that
9 then held by SOS.

10 Another tabled amendment in the Senate would have
11 expanded the form of ID that could serve as SB-14 compliant ID,
12 and the Legislature rejected this amendment because it was
13 based on the practical concern that in a State as big as Texas
14 many forms of ID would have made it difficult for the person
15 who is working at the polls.

16 Now one can disagree with the policy assessments made
17 with the legislature in the rejection of these amendments, but
18 there is nothing inherently invidious about them and the record
19 evidence supports it.

20 Plaintiffs also contend that SB-14 was a substantive
21 departure because the bill was not identical to the Indiana and
22 Georgia statutes on which bill proponents claim to have modeled
23 it. But nothing in the way SB-14 differs from those bills
24 suggests an invidious substantive departure from the policy
25 factors important to the Legislature.

1 Plaintiffs are quick to point out that SB-14 did not
2 have an indigency exception making it different from Indiana's
3 law. The Plaintiffs narrative glosses over the story of how
4 the indigent affidavit exception came to be removed from SB-14.

5 The Senate's version of SB-14 contained the affidavit
6 exception, but when the House debated the bill it removed the
7 exception and we see here from the testimony from the House
8 floor debates in the legislative record and they reveal that
9 the removal of the provision was done because Representative
10 Anchia criticized it and blew it up by opposing the affidavit
11 exception in the Senate version. Accepting Representative
12 Anchia's criticism of the indigent fee affidavit procedure the
13 affidavit exception was subsequently excised from the House
14 version.

15 No one in this case has ever argued that
16 Representative Anchia had an invidious intent when he made
17 these statements on the House Floor, and with the elimination
18 of this provision in the House version the Legislature had to
19 replace the indigent exception with the Georgia-inspired
20 provision that would allow for free EICs in order to ameliorate
21 the possible effects on disadvantaged voters. There's no way
22 these actions by the Legislature can be classified as
23 substantive departures.

24 Plaintiffs also suggest that the Legislature had
25 shifting rationales when it came to voter ID. For instance,

1 they focused on an email sent by a staffer for the Lieutenant
2 Governor to suggest that the Legislature moved away from the
3 rationale that voter ID was meant to curb the problem of non-
4 citizen registrants which was one of the original purposes
5 expressed when voter ID was first introduced.

6 And then they claimed that the Legislature created a
7 different rationale that was never its true intent, but that's
8 not true when you look at the documents in this case. This
9 exhibit did not demonstrate a shifting rationale by the
10 Legislature which is located at ROA-38994. This email from a
11 staffer from the Lieutenant Governor states that the
12 Legislature is not doing this, passing SB-14, to crack down on
13 illegals, but it says nothing about the separate topic of non-
14 citizen voting.

15 And the other email the Plaintiffs point to they --
16 they are talking about -- these are talking points that a
17 staffer from the Lieutenant Governor sent to other legislative
18 aides which highlights the problem of non-citizen registrants.
19 Thus, the rationale regarding non-citizen voting continue to
20 exist, but it never reached the level of the Legislature's
21 concern like voter confidence and in person voter fraud did.

22 The Plaintiffs also make much about the Legislature's
23 concerns regarding the pre-clearance of SB-14. They point to
24 an email from Senator Estes voicing concerns whether SB-14
25 complied with the Voting Rights Act. They contend that this is

1 evidence that the Legislature knew the law would
2 disproportionately impact minorities. But this evidence merely
3 demonstrates that Senator Estes was performing his due
4 diligence by asking about pre-clearance as Texas was a covered
5 State at the time they considered SB-14 and a concern regarding
6 the statute would pass pre-clearance review is actually
7 evidence that Senator Estes and the Legislature acted for
8 proper purposes and not with a discriminatory purpose.

9 The same is true of the other emails Plaintiffs point
10 to. Plaintiffs rely on an email which was sent from one
11 Legislative aide to another where the Lieutenant Governor
12 staffer states the unremarkable proposition that a law that
13 allows non-photo ID places less of a burden on voters in
14 general and, therefore, has less of a chance to burden any
15 minorities.

16 This is not the same as suggesting that the exclusion
17 of non-photo ID will disproportionately burden minorities and
18 the point of this email was that the Department of Justice
19 would have to pre-clear a voter ID law that imposed less of a
20 burden than Georgia's.

21 And in a second email the same staffer opined to
22 other aides that it was doubtful that the Obama Department of
23 Justice would pre-clear SB-14 as written, and the staffer
24 explained that it was his reasoning that the Obama DOJ had been
25 aggressively interpreting and enforcing the Voting Rights Act

1 through pre-clearance. But he never stated that it was his
2 belief SB-14 would disparately impact minorities.

3 There's nothing in this email or the other documents
4 demonstrating the illicit motive that Plaintiffs contend the
5 Legislature had with SB-14. Instead, the evidence merely
6 suggests that the Legislature was concerned about pre-clearance
7 because it wanted its law to become effective in order to
8 prevent voter fraud and improve confidence in the elections.

9 The Plaintiffs' complained also that the Legislature
10 must have had another motive other than its stated purposes in
11 the public record because there is no evidence of in person
12 voter fraud. This argument falls apart for two different
13 reasons.

14 First, Plaintiffs theory is unsupported by the
15 Supreme Court's reasoning in Crawford which found that the law
16 was justified by the threat of voter fraud even though the
17 record contained no evidence that any such fraud existed.

18 Second, the Legislature had evidence before it that
19 voter fraud existed and that it is hard to detect. In 2011 the
20 House Select Committee on voter identification and voter fraud
21 heard testimony from individuals who had personally witnessed
22 instances of people voting more than once at a single polling
23 location.

24 **THE COURT:** But why wasn't that evidence brought
25 forward during the trial?

1 **MS. COLMENERO:** This evidence was contained in the
2 legislative record, your Honor --

3 **THE COURT:** But during the trial?

4 **MS. COLMENERO:** Your Honor, on remands now that we
5 are --

6 **THE COURT:** No, no, I know we can't go there now, but
7 I'm just saying I think I specifically asked during the trial
8 can't you prove X or wouldn't it be maybe not super easy but
9 you could easily get some information and it -- as I recall the
10 State of Texas did not present any evidence about any of these
11 things that were said.

12 **MS. COLMENERO:** Well, your Honor, I --

13 **THE COURT:** And I may be wrong, it's been a long
14 time, but do you recall any evidence in the record presented
15 regarding people voting twice?

16 **MS. COLMENERO:** Your Honor, I was not present at the
17 trial several years ago --

18 **THE COURT:** Ms. Wolf was. Do you remember, Ms. Wolf,
19 if there was any evidence of that?

20 **MS. WOLF:** I'm just looking at that right now, your
21 Honor.

22 **THE COURT:** Yeah. I mean, you can go on, I just -- I
23 remember specifically asking about it because there were these
24 statements that somebody's grandfather voted and he had died,
25 you know, 20 years ago, and I said "Well, where's that

1 evidence? Couldn't you find that and present it to the Court,"
2 and I don't remember that being presented, but anyway you can
3 move on.

4 **MS. COLMENERO:** Well, and on remand, your Honor, the
5 Fifth Circuit has instructed this Court to look at the entire
6 record again, and this evidence that we are discussing here is
7 located at ROA-7 --

8 **THE COURT:** I understand you're saying this is
9 evidence that the Legislature considered and said that goes to
10 their intent or whatever it may be, but I think the Fifth
11 Circuit also realized there's really no evidence of this voter
12 fraud that is the concern here, so that's what I'm getting at
13 still two years later. I don't think the State ever presented
14 any evidence of that but, you know, it's been awhile.

15 **MS. COLMENERO:** Well, and look -- and the evidence
16 that we are referencing here is evidence that is part of the
17 Court's record that was presented not only to this Court, but
18 to the Fifth Circuit --

19 **THE COURT:** But that's all hearsay, right? Yes, I
20 understand you're saying the Legislature had this before, you
21 had people were saying X, Y and Z, that's not evidence for a
22 trial court, so I'm saying I don't think there was any evidence
23 ever presented by the State of Texas that these people were
24 voting more than once. Right? There may have been one or two
25 instances -- I don't -- I don't remember exactly, but I

1 remember inquiring about that, or so I thought, and it was not
2 presented which I understand, a little different than here, but
3 we can talk about "Oh, so and so's grandfather voted and he's
4 been dead" and all this stuff, that was not Court evidence that
5 I recall, no one ever presented that, right?

6 **MS. COLMENERO:** Okay.

7 **THE COURT:** You weren't here --

8 **MS. COLMENERO:** We will confirm for that --

9 **THE COURT:** -- it's been a long time.

10 **MS. COLMENERO:** -- and we will clarify that on the
11 record, but we do want to point out that when the Legislature
12 was considering SB-14 they had before it certain evidence that
13 they heard regarding the incidents of voter fraud and that
14 evidence is within the legislative record that is part of the
15 evidence before this Court, and that included testimony before
16 a House Select Committee from the -- in the 2011 where the
17 Texas Attorney General's office had investigated approximately
18 12 cases of voter impersonation since 2002, and the
19 Legislature, in the legislative record, took notice of the
20 Carter-Baker Commission observation of voter fraud in other
21 States.

22 And this evidence of in person voter fraud that the
23 Texas Legislature heard at the time they were considering SB-14
24 exceeds the evidence or the lack thereof that the Supreme Court
25 held to be sufficient in the *Crawford* case.

1 And so in conclusion, your Honor, we contend that the
2 overwhelming evidence in the record demonstrates that the Texas
3 Legislature enacted SB-14 for a proper purpose and not for the
4 secret purpose that the Plaintiffs suggest here today.

5 After getting a treasure trove of documents in this
6 case and weeks of intrusive discovery Plaintiffs cannot
7 identify a single document or statement expressing an invidious
8 intent by any legislator or their staff to suppress minority
9 voting through SB-14, and the evidence only confirmed that the
10 Legislature's publicly stated purposes showed that race had
11 nothing to do with it, and without the ability to rely on this
12 evidence Plaintiffs have no choice but to fall back on tenuous
13 circumstantial evidence. And you heard here today, they want
14 this Court to infer that there is evidence of discriminatory
15 intent from various pieces of circumstantial evidence, but this
16 is evidence that the Fifth Circuit has discredited and these
17 are evidence of discriminatory acts by Texas in the past, as
18 well as procedural maneuvers used by SB-14 proponents that were
19 simply done to get the bill to an up or down vote and none of
20 this evidence is probative or sufficient to overcome the
21 mountain of direct as well as circumstantial evidence
22 dispelling any notion of discriminatory motive. As a result
23 the Plaintiffs have failed to show that the Legislature's
24 reasons were pretextual and none of this evidence allows the
25 Court to overcome the presumption of constitutionality of the

1 Legislature's actions to invalidate the statute.

2 The Court must presume that the Legislature acted
3 with good faith here, and there's -- the Plaintiffs' theories
4 really only make sense if you presume that the Legislature
5 acted with bad faith, but there's no evidence to support that.
6 And for these reasons the Court should reject the Plaintiffs'
7 claim that SB-14 was enacted with a discriminatory purpose and
8 they should enter judgment on this claim in favor of the
9 Defendants.

10 And one side note, your Honor, to address the Motion
11 to Dismiss by the United States. While the Court went forward
12 with the hearing today and heard evidence and statements on the
13 issue of discriminatory intent the State believes that this
14 Court should refrain from issuing a ruling on the issue of
15 discriminatory intent until after June 18th in order to give
16 the Legislature time to consider the new legislation that is
17 before it.

18 **THE COURT:** Okay. And after hearing argument on that
19 I'm still not clear how that new law affects this Veasey case
20 because I heard again from the Defense, I believe Ms. Nelson
21 argued, that goes to remedies and Mr. Gore said no, it goes to
22 beyond remedies, and so I don't know -- I think there is still
23 a question, at least in my mind, and maybe it's just opposite
24 positions, but I don't know that anyone has kind of cited law
25 on that or what has happened in the past in these situations,

1 and I may be wrong, I'd have to go back and look at the prior
2 Motion for Continuance to see what was in there. How did a new
3 -- if a bill's enacted and it addresses the situation before
4 the Court how it affects the pending case. I mean, you can
5 argue all you want, both sides, but I'm not real clear on --
6 based on your argument exactly how it affects what this Court
7 should do. I'm going to have to rule on the intentional issue
8 anyway and consider what the intent was in 2011 but, no, as
9 Mr. Gore said, you consider the new bill when you're taking all
10 the factors into account.

11 I believe I heard -- I thought I heard Ms. Nelson
12 say, no, it only goes to remedies, so it's still kind of across
13 the board for me here.

14 We're going to take -- are you finished?

15 **MS. COLMENERO:** Yes, your Honor.

16 **THE COURT:** Okay, we're going to take about a 10-15
17 minute break, and then did the Government want to say
18 something? I thought you-all wanted a few minutes of argument
19 or no?

20 **MR. GORE:** I think we're satisfied with the time the
21 Court has given us, your Honor.

22 **THE COURT:** Okay, then rebuttal from the Plaintiffs
23 when we come back.

24 **THE CLERK:** All rise.

25 **(Recess taken from 11:12 to 11:34 a.m.)**

1 **THE COURT:** You can have a seat. So, Ms. Perez, I
2 believe you were going to do the rebuttal.

3 **MS. PEREZ:** Good afternoon, your Honor, Myrna Perez
4 from the Brennan Center representing the Texas NAACP and the
5 Mexican American Legislative Caucus.

6 Texas has spent the last 40 minutes or so distorting
7 facts, misrepresenting the factual standard, the legal standard
8 and misrepresenting and mangling what the Fifth Circuit found.
9 They are doing so with the hope of trying to cast doubt on this
10 Court's earlier finding of discriminatory intent.

11 We maintain that it is improper for them to do so,
12 that they have not successfully done so, and I'd like to
13 respond to a few of their points, but before I do that I want
14 to note what is not in dispute.

15 What is not in dispute is that it is, in fact, hard
16 work to find discriminatory intent, especially with the
17 legislative body. We submit that this Court did that hard
18 work. We had a very extensive and lengthy trial, we had
19 numerous credible and compelling witnesses. The Court used the
20 tools afforded to it, Arlington Heights, to meet the standard,
21 and despite the fact that in this day and age people are smart
22 enough not to be naked about their discriminatory intent, in
23 spite of the fact that Senator Fraser and others noted that
24 everything they said was going to be on the record, there was
25 ample evidence to reach a conclusion of discriminatory intent.

1 And their mischaracterization of what the Fifth Circuit demands
2 in terms of reassessing the evidence doesn't change that.

3 The Fifth Circuit was very aware of the standard,
4 they set it for us. They affirmed that *Arlington Heights* and
5 circumstantial evidence was all appropriate and there are no
6 fewer than seven places, your Honor, in the Fifth Circuit
7 Opinion in which they, after considering all of the evidence
8 and the appropriate legal standard, concluded that there was
9 enough evidence to support a finding of discriminatory intent.
10 I'm, in fact, going to quote from just part of it in Footnote
11 13:

12 "We conclude that there is evidence that could
13 support a finding that the Legislature's
14 justification of valid integrity was protectoral in
15 relation to the specific stringent provisions of SB-
16 14."

17 So much of what we heard was new and a distortion of
18 the record, but not actually a factual dispute. It's rather,
19 instead, your Honor, a dispute with what this Court has weighed
20 and the inferences that it has drawn. They want this Court to
21 re-weigh the evidence and come up with inferences more
22 favorable to them. But, your Honor, the inferences they want
23 to draw from the evidence are, frankly, implausible.

24 I'd first like to respond to their point that they
25 had a nondiscriminatory explanation for SB-14.

1 My colleague, Ms. Nelson, pointed out in detail that
2 it keeps shifting, it shifted on the legislative floor and it
3 shifted in the litigation. Their grand modernization wave
4 that, you know, compelled a look at SB-14 was not so much of a
5 wave, but maybe a drip.

6 Prior to the passage of SB-14 there were a grand
7 total of four States that passed strict photo ID law, four
8 States out of 50. That is hardly a modernization wave; that is
9 hardly a level, an outpouring of support that commands and
10 demands a law as strict as what we saw in SB-14; and, more
11 importantly, it didn't look like Georgia and Indiana, the other
12 bills that it purported to model itself on. It departed from
13 them in very significant ways, ways that would have ameliorated
14 some of its impact and ways that would have buttressed its
15 constitutionality.

16 In fact, Janice McCoy, who was Senator Fraser's
17 Chief-of-Staff, admitted that she didn't even review Georgia or
18 Indiana before writing this bill, so it strains the imagination
19 to be able to suggest that -- that Georgia, Indiana and this
20 sort of, you know, clamor in some very small parts of the
21 Legislature were compelling a law as stringent and as over the
22 top as SB-14 was.

23 And because your Honor is interested in this I want
24 to remind your Honor of the record that we have that the
25 Legislature knew that there was no problem with fraud that

1 would be resolved by SB-14. We had the 2009 testimony by
2 Deputy Attorney General Nichol before the Senate Committee as a
3 whole, that said that not a single voter fraud prosecution
4 conducted by the Attorney General's office since 2002 would
5 have been prevented by photo ID.

6 We have the 2010 hearing before the House Committee
7 on Elections in which Ms. McGee, head of the Elections
8 Division, testified that the Election Division had referred to
9 the Attorney General 24 potential violations of the Election
10 Code, but only two of them involved allegations of an in person
11 voter impersonation, so we have both Chambers hearing this.

12 But what happened with respect to the sponsors is
13 very revealing. We had Senator Fraser and Representative
14 Harless during the debates on SB-14, not be able to revive any
15 evidence as to the scope of in person impersonation fraud.
16 They kept saying they weren't advised and it is incredulous to
17 suggest that the bill sponsors had an earnest and pure motive
18 of combating in person impersonation when they, themselves, had
19 no idea of whether it was even a problem.

20 The -- Texas tries to maintain that they had a number
21 of really good explanations for some of the choices that
22 they've made, but they have not provided a sufficient -- a
23 sufficient explanation for why there is an ID exemption to the
24 absentee ballot process.

25 Now this is important for two reasons because there's

1 two inferences of discriminatory intent that can be found from
2 exclusion of absentee ballots.

3 The first is that there is actually some record
4 evidence that absentee ballots were a source of insecurity and
5 they did nothing to address it.

6 The second is that absentee ballot usage is
7 overwhelmingly by older Anglos with respect to how it is used
8 by African-Americans and Latinos. I want to take the first
9 part of the known fraud that exists with absentee ballots.

10 We have a 2006 study of election fraud by the Texas
11 Legislative Counsel concluding that State and Local officials,
12 these are the ones that are closest to the administration of
13 elections, concluded that absentee -- absentee voting was the
14 largest vulnerability in the State voting system. Even when
15 Attorney General himself, Abbott, announced a voter fraud
16 initiative in 2006 he only noted four potential offenders, none
17 of which would have been resolved by photo ID law, but two of
18 which were for mail ballots.

19 Now the 2000 -- the argument that they make about the
20 2003 legislation, in addition to being new, doesn't help them
21 very much because the legislative council study occurred in
22 2006. Three years after they supposedly addressed the problem
23 of mail balloting we still had that being consistently the
24 Number 1 concern from State and Local election administrators.

25 And then they tried to argue again new that the 2007

1 and 2011 mail ballot law also addresses the problem of mail
2 balloting, and I think what these bills do is actually very
3 revealing that there was something going on more with SB-14.

4 Both of these bills address how someone can be
5 prosecuted for mail ballot. You know, in one instance they may
6 get -- you're allowed to bundle the crimes together so someone
7 can get a harder penalty. It is solely prosecutorial side. It
8 doesn't deal with detection, it doesn't deal with prevention,
9 and that is in an area where they know that they have a
10 problem.

11 Compare that to SB-14 where they don't have a
12 problem. There they're putting all sorts of barriers to access
13 so that people actually can't vote in person. They didn't
14 choose to take the same sort of steps with the 2007 or the 2011
15 bill. It was never declared an emergency, nobody suspended the
16 two-thirds rule, so here we have two bills addressing different
17 kinds of fraud, one which there's record evidence was more
18 severe and one that wasn't, and then they were willing to rely
19 solely on after the fact prosecutorial punishment in terms of
20 dealing with it.

21 So these kinds of policy choices, your Honor, are so
22 incongruous with the stated purposes of what SB-14 is that
23 Deputy General Counsel Hebert had to send people an email in
24 his own words "to remind people what the point of the bill
25 was," and urging them to emphasize detection of deterrence of

1 fraud and protecting public confidence in elections.

2 This is not an action that would have been necessary
3 with an earnest and pure motive of ballot integrity. In fact,
4 and this has been mentioned before, Representative Harless, who
5 was one of SB-14's sponsors, had her own ID bill and she
6 allowed non-photo IDs in that bill, and she couldn't remember
7 why in her bill it was acceptable to have non-photo IDs, but
8 not in SB-14. She didn't even know whether or not she thought
9 that student IDs were to be acceptable for voting as a form of
10 showing identification.

11 Again, it strains imagination to argue that she could
12 have had an earnest and pure motive of combating fraud and
13 promoting ballot integrity when such basic questions as to why
14 she pushed for a policy like SB-14 couldn't be answered.

15 And then there's the mail ballot exemption. It's
16 worth reminding this Court that the legislature had a ready
17 option of ameliorating the kind of burdens that would be on
18 elder Texans. They had an exemption for people over 70, and
19 instead of picking the in person exemption for people over 70
20 they picked the mail ballot exemption.

21 Why?

22 Well, in 2008, 2010 and 2012 Anglo use of absentee
23 voting in Texas had exceeded Latino and African-American use.
24 And the context of this is super important because it is not
25 plausible that legislators who live and die by votes, live and

1 die on whether or not they understand who their constituents
2 are, how they're voting and why they're voting would not know a
3 fact like that. But let's pretend, even for a second, that
4 they didn't.

5 Well, Representative Veasey and Representative Alonzo
6 said as much, they actually testified that we needed this over
7 70 exemption, and yet they elected, instead, to go with the
8 mail ballot exemption where, again, there were known
9 vulnerabilities.

10 So as has been mentioned before the Fifth Circuit
11 emphasized on Page 27 of its Opinion that this Court simply
12 does not have to blindly accept Texas's proposition that
13 legislators were really so concerned with this nonexistent
14 problem.

15 And now Texas is trying to say that the Legislature
16 had no reason to believe that there was a discriminatory
17 effect. I would respectfully disagree with that and like to
18 point a few places on the record.

19 We have evidence on the record and the 2009 Senate
20 Committee on the Whole (phonetic) transcript of Senator Fraser
21 sharing information he obtained from the SOS estimating that
22 809,000 Texans lacked DPS ID and that he assumed the racial
23 breakdown of those lacking IDs would be the same in Texas and
24 elsewhere in the country; in other words, minorities are
25 disproportionately most likely to have these IDs.

1 And then the legislators were advised by Lieutenant
2 Governor Deputy General Counsel Brian Hebert that SB-14 would
3 not be pre-cleared as written.

4 Now what does that mean?

5 It means that Texas would not be able to prove its
6 standard that it would not make minority voters worse off.

7 Then we had Senator Todd Smith who noted that it was
8 common sense that SB-14 would disproportionately impact
9 minorities, and Texas is trying to push this into the category
10 of a stray remark by a proponent.

11 I want to be very clear that the Fifth Circuit said
12 that comments about actions and about what people did was
13 acceptable, it was merely like speculation about what other
14 people did. Senator -- Representative Smith said in his own
15 deposition that he was telling people about this DPS report.
16 This -- this is perfectly sound ground to consider and has not
17 been made infirm by the Fifth Circuit.

18 Moreover, in every single session in which strict ID
19 was raised, 2005, 2007, 2009, 2011, there was expert and lay
20 testimony that requiring photo IDs would disproportionately
21 affect African-American and Latino Texas.

22 There was also witnesses in 2011 explaining that
23 strict ID requirements would adversely impact minority voters.
24 But to be clear we're not claiming solely that the Legislatures
25 knew, even though they did. They didn't try to soften the

1 discriminatory blow, and this is important and this is
2 important to the Fifth Circuit. In all Senators proposed 37
3 amendments to SB-14, 28 of them were tabled. Representatives
4 proposed 53 amendments to SB-14, 35 of them were tabled, three
5 failed and 15 were adopted, although some of them were later
6 removed.

7 Some of the ameliorative amendments that SB-14 voted
8 to table:

9 Expanding the types of accepted IDs;
10 Expanding DPS hours;
11 Delaying implementation until after an impact study;
12 Waiving costs for underlying documents;
13 Providing an affidavit alternative.

14 And they didn't just reject these amendments, your
15 Honor, they actually stripped certain ameliorative components
16 like the indigency exemption and the over 70 exemption.

17 I'm going to spend a little bit of time on the
18 indigency exemption because Representative Anchia is my client
19 and he is in this courtroom, and Texas repeatedly says that he
20 voted to strip the indigency section from the bill. It is
21 simply not true, you can ask him yourself if you have any
22 questions and we've made this clear on the record.

23 And, importantly, the proponents have declined to
24 explain both contemporaneously and in subsequent litigation why
25 they took any of these steps.

1 We had Senator Patrick conceding that some of these
2 amendments would have ameliorated the burden, but he couldn't
3 recall why he voted for them or why he didn't vote for them
4 which this Court noted was really out of character for a
5 sponsor of a major bill.

6 And then Senator Fraser, the Senate sponsor,
7 basically admitted on the Senate floor that SB-14 wasn't
8 intended to be the least restrictive means of combating fraud.
9 I want to read this part from the transcript.

10 You have Senator West asking:

11 "So the list of identifications that you use as is
12 that the least restrictive options you could come up
13 with?

14 Senator Fraser's response:

15 "Well, I don't -- I'm not sure, the verbiage you're
16 using, I don't know that that's the intent."

17 The Fifth Circuit has approved an inference from the
18 fact that the record shows that drafters and proponents of SB-
19 14 were aware of the likely disproportionate effect of the law
20 on minorities and that they nonetheless passed the bill without
21 adopting a number of these proposed ameliorative measures that
22 might have lessened this impact.

23 And then, finally, your Honor, I want to talk to the
24 claim that Texas is trying to purport that this was just like
25 brass knuckle politics and that explains all of the procedural

1 departures.

2 First of all, the Fifth Circuit wasn't buying it.
3 They said that SB-14 was subject to numerous and radical
4 procedural departures that may lend credence to an inference of
5 discriminatory intent.

6 What were some of those?

7 Getting special permission to file the bill in real
8 low number reserved for priorities.

9 Designating the bill as emergency legislation.

10 Allowing the bill to bypass ordinary committee
11 process.

12 Passing resolutions to allow the Conference Committee
13 to add provisions to SB-14 contrary to the normal rules and
14 practices.

15 Passing SB-14 with a fiscal note.

16 And suspending the two-thirds rule regarding the
17 number of votes required.

18 Now, Texas is trying to argue that this two-thirds
19 rule was merely calendaring and it was like routinely
20 suspended, but that contradicts the record. We have Senator
21 Davis and Janice McCoy who was Fraser's Chief-of-Staff, both
22 testify that few, if any, bills are voted on each session
23 without a two-thirds rule.

24 We had Senator Uresti testify that creating a
25 category-wide exemption to the two-thirds rule, like was done

1 for photo ID, was aberrational.

2 And then we had Lieutenant Governor Dewhurst himself
3 testify that he could think of no other special rule that
4 specifically exempted a particular subject matter of the case.

5 Context matters, of course, your Honor, but -- and
6 this evidence of procedural departures provides an important
7 potential link in the circumstantial totality of the evidence
8 the District Court must consider.

9 So, in summation, none of these facts, the
10 nonexistent problem to solve, the ignoring of the
11 discriminatory effect, the failure to adopt ameliorative
12 measures, the procedural departures have occurred in isolation
13 or in a vacuum; but rather they have occurred together and
14 they've interacted with each other to produce a persuasive and
15 powerful set of inferences that at least part of what was
16 happening in the Legislature was an intent to minimize the
17 political influence of minority voters.

18 Contrary to what Texas has said, we only need to
19 prove that racial discrimination was one purpose, and we don't
20 even need to prove that it was a primary purpose, but we
21 respectfully submit that we have done that and that this Court
22 can and should enter a finding that SB-14 was enacted in part
23 with discriminatory intent and violation of the Voting Rights
24 Act and the Constitution.

25 **THE COURT:** Thank you.

1 **MR. DUNN:** Your Honor, I rise to just briefly to
2 address the Court's question posed right before the break. The
3 Court was asking for some authority on the issue of waiting for
4 the passage of Senate Bill 5 and I take responsibility for not
5 having provided that earlier.

6 I do want to reference first some specific
7 authorities and then some more general authorities.

8 One, in this case I would note that the Legislature,
9 after the trial and after this Court's conclusion and judgment,
10 passed a bill finally making it free to get a birth certificate
11 in Texas. That -- that bill, I believe it was 685, was
12 referenced by the Circuit in its Opinion and there wasn't any
13 allegation by the en banc Court or anybody at that point that
14 "Look, the bill has changed in some material respect and so we
15 have to start over or delay, or that the Legislators' actions
16 have mooted the controversy."

17 I will also point out a case called Perez v Perry
18 which is pending at the moment in San Antonio, some of us are
19 involved in, there is an Opinion at 970 F. Supp 2(d)593 and
20 then specifically Page 603, Judge -- Circuit Judge Smith who,
21 as the Court knows, was the dissenting Judge in the en banc
22 Opinion in this case, wrote a Decision joined by his two
23 colleagues in the three-Judge District Court in
24 *Perez v Perry* finding that the fact that the Legislature in
25 that re-districting case had come in after trial and adopted a

1 remedy plan, essentially a plan that had been developed through
2 the Court system, did not moot the controversy as to whether
3 the original re-districting plan was adopted with a
4 discriminatory intent. And, indeed, the process there in *Perez*
5 *v Perry* and the consideration of that evidence continues. That
6 Court is now balancing the -- the testimony as we asked your
7 Honor to do in this case, as to whether the 2011 Legislature
8 acted with a discriminatory intent.

9 I'll also note that the North Carolina challenge to
10 its voter ID law went to the Fourth Circuit. In the interim
11 the Legislature there changed the ID law and the Circuit
12 addressed the issue of whether that change prevents them from
13 considering the question of whether the original bill was
14 passed with a discriminatory intent, and the Circuit reached
15 the opinion that it was still necessary to decide the intent
16 question.

17 Indeed, the Supreme Court Decision in *Knox versus*
18 *Service Employees International Union* says "A case becomes moot
19 only when it is impossible for a Court to grant any effectual
20 relief whatsoever to the prevailing party."

21 There's also a couple of other specific authorities
22 I'd like to address with the Court. One of them is a re-
23 districting case, *Blackmoor versus Charles Mix City*, it's 505
24 F. Supp. 2(d) 585. This is a -- it was a Voting Rights Act and
25 a malapportionment challenge to a re-districting plan.

1 The District Court found that there was
2 malapportionment and posed a remedy, and the State there argued
3 that now that the remedy also addresses the Voting Rights Act
4 violation remedy, then we shouldn't consider that claim, and
5 that three-Judge District Court also denied that position and
6 said "we, nevertheless, have to consider the Voting Rights Act
7 challenge whether or not it's been remedied by the
8 malapportionment remedy."

9 I'd also note that 3(c) of the Voting Rights Act
10 itself states that: "The Court shall retain jurisdiction for
11 such period as it may deem necessary," so it seems that there
12 is specific statutory language in favor of continuing the
13 proceedings.

14 And then, finally, I would also note the Voluntary
15 Cessation Doctrine which is also discussed at length by Judge
16 Schmidt in *Perez v Perry* which gives it this notion of a
17 wrongdoer, in this case the State, voluntarily ceasing to do
18 harm. In this case, of course, we submit that the State is
19 voluntarily ceasing to eliminate only part of the harm and it's
20 not really voluntary either because the Fifth Circuit has
21 ordered it to be done, as has this Court, but in any event,
22 when -- even were the State to have stepped forward and said
23 Bill 5, even if it had been constructed in such a way to fully
24 remedy the harm that's been alleged in this case, the Voluntary
25 Cessation Doctrine requires the Court to continue to maintain

1 jurisdiction and to give effect to its Order. The cite for
2 that is Sossamon versus the Lone Star State of Texas, 560 F3d
3 316, specifically Page 324, and that was affirmed by the US
4 Supreme Court.

5 The last point I want to make is that in this very
6 case the United States filed a document at ECF 920, and in that
7 paper filed back in August of last year the United States said
8 to be sure the Fifth Circuit instructed that "any interim
9 legislative action taken with respect to Senate Bill 14" should
10 be taken into account by the District Court.

11 But that's a far cry from requiring this Court to lay
12 reposed until the Texas Legislature acts.

13 And the United States goes onto cite the en banc
14 decision in this case and also the US Supreme Court Decision of
15 City of Richmond versus United States for the proposition that
16 an official action taken for the purpose of discriminating on
17 the account of race has no legitimacy at all.

18 The United States' position, they got it right the
19 first time, and the Court ruled correctly in the Fall that this
20 proceeding should continue, and the Motion filed late yesterday
21 shouldn't disturb that already well-founded Decision.

22 **THE COURT:** All right. Anything further?

23 **MR. FREDERICK:** Your Honor, Matt Frederick for the
24 State of Texas. May I very briefly address the question you
25 raised about mootness and a suggestion?

1 **THE COURT:** All right.

2 **MR. FREDERICK:** Thank you. May it please the Court,
3 I want to talk about the mootness issue that your Honor raised
4 earlier, but first I want to talk about how the existence of
5 the potential passage of Senate Bill 5 and its companion bill
6 are relevant to the question of legislative purpose.

7 I'll first note that throughout this case the
8 Plaintiffs themselves have continually pointed out the
9 Legislature's failure to take any action after this Court's
10 decision and after previous Court decisions as further evidence
11 of a -- of a negative discriminatory purpose, for example,
12 their Findings of Fact at Page 123 and their Brief, their
13 opening Brief in this Court on remand at Page 21.

14 They criticize the State Legislature for failing to
15 take action after the denial of pre-clearance. There's, of
16 course, an obvious reason why they didn't act because we tried
17 to appeal that decision, which was wrong and our appeal was
18 mooted out.

19 But the Plaintiffs can hardly stand before the Court
20 now and say that post -- that later action by the Legislature
21 is completely irrelevant. It's also relevant because how the
22 Legislatures respond to a conclusive Court ruling that their
23 law did, in fact, had a discriminatory effect as the Fifth
24 Circuit that is relevant to what they intended to do,
25 especially here where we have evidence where the Legislators

1 rightly or wrongly consistently said "We just do not think this
2 is going to have a discriminatory impact on the basis of race."
3 Once the Court decides otherwise it's relevant to see what they
4 do about it, and right now they're trying to do something about
5 it.

6 The second point is on mootness. If SB-5 or its
7 companion pass the discrimination claim, the intentional
8 discrimination claim here could and very likely would become
9 moot. The authority for that proposition mostly comes from
10 cases where a case becomes moot on appeal. One is Diffenderfer
11 versus Central Baptist Church, 404 US 412, Northeast Florida
12 Chapter of Associated General Contractors versus City of
13 Jacksonville, 508 US 656, and Hayden versus Patterson, 594 F3d
14 165, that's a Second Circuit Decision from 2010.

15 The Fourteenth Amendment to find an equal protection
16 violation requires proof of both discriminatory intent and a
17 discriminatory effect, and they're seeking prospective
18 injunctive relief.

19 If the discriminatory provisions are replaced and
20 repealed then that changes the analysis necessarily because
21 there is no longer a basis to impose liability on the strength
22 of provisions that have been vacated or replaced. In that case
23 were the Court to issue an Opinion on provisions that no longer
24 exist that would be an advisory Opinion. And that's even more
25 so here where we don't have the Final Judgment from the

1 District Court yet, so this is even a further step removed from
2 the cases involving mootness on appeal where there is a
3 judgment of the District Court and the Courts stills say "We
4 have to consider the law as it is now." That is all the more
5 true where there is no judgment in the District Court and
6 that's what we have here.

7 The Voluntary Cessation Doctrine would not prevent
8 this Court from finding the claim moot and I would encourage
9 the Court to go read *Sossamon*, the Fifth Circuit's Opinion,
10 because what that Opinion says is that "Yes, while the
11 Voluntary Cessation Doctrine exists and it applies, when it's a
12 Governmental entity that acts in that case a prison
13 administrator making a policy change then we afford them a
14 presumption of good faith." And that is all the more true when
15 it's a Legislature that actually goes through the process of
16 passing a bill, and so that's why it is relevant to the
17 question of intent.

18 And, of course, it is also relevant to the question
19 of a remedy that the Plaintiffs seek under Section 3(c) of the
20 Voting Rights Act. It's critical to that inquiry because the
21 question there is whether an extraordinary remedy is necessary
22 and in order to justify that remedy there must be pervasive
23 discrimination, there have to be exceptional conditions,
24 particularly there has to be a situation where a State
25 Legislature is acting in defiance of the Constitution and

1 taking steps to stay one step ahead of the Federal Courts.

2 It doesn't -- the justification for that remedy
3 cannot exist when the State is not staying one step ahead, but
4 it's following the lead of the Courts, and if the State
5 Legislature passes SB-5 and its companion that's exactly what
6 they would be doing, and that's why we would urge the Court to
7 forebear on a ruling.

8 **THE COURT:** All right. Anything further on that
9 point?

10 **MR. ROSENBERG:** Yes, your Honor. As we said we'd
11 like to reserve our -- we have reserved our right to file a
12 response to the United States Motion and we'd like to ask when
13 your Honor would like to see our response?

14 **THE COURT:** Okay. Well, actually, let's do this, I'm
15 going to ask for a briefing on that issue we've been discussing
16 regarding the enactment of -- of Senate Bill 5. If it's
17 enacted into law how that would -- how it would affect the
18 current proceedings before this Court? So instead of maybe
19 responding to the Government's Motion withdrawing their claim
20 regarding discriminatory purpose, why don't I give the
21 Plaintiffs a week to file some briefing on that issue; then the
22 Defense can have a week after that; and then maybe a week after
23 that for the Plaintiffs to reply?

24 **MR. ROSENBERG:** That would be fine, your Honor.

25 **THE COURT:** On that issue. So in terms -- do you

1 need to file a response to the Government's Motion or do you-
2 all just want to handle it in this way?

3 **MR. ROSENBERG:** We can handle it -- we can combine
4 our response to the Government's Motion in that briefing.

5 **THE COURT:** Okay. So then I'll hold that Motion then
6 until the response is filed.

7 Regarding the remainder of the discriminatory
8 purpose, I'll take that under advisement and await further
9 briefing on the issue of the effects of any possible change in
10 the law regarding voter ID.

11 Is there anything further from the Plaintiffs this
12 morning?

13 **MR. ROSENBERG:** No, there is not. Thank you, your
14 Honor.

15 **THE COURT:** Okay. No one here. Defense?

16 **MS. COLMENERO:** Nothing, your Honor.

17 **THE COURT:** Texas? The Government? The United
18 States?

19 **(No audible response)**

20 **THE COURT:** All right, thank you very much for your
21 time and you are excused.

22 **(This proceeding was adjourned at 12:04 p.m.)**

23

24

25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

March 5, 2017

Dated

TONI HUDSON, TRANSCRIBER